(26,056)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1917.

# No. 589.

BALL ENGINEERING COMPANY, PETITIONER,

*vs.*

J. G. WHITE & COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.


| | Original. | Print |
|---|---|---|
| Caption | a | 1 |
| Transcript of record from the district court of the United States for the district of Connecticut | 1 | 1 |
| Petition for writ of error and order allowing same | 1 | |
| Writ of error | 3 | 2 |
| Citation and service | 5 | 3 |
| Assignment of errors and prayer for reversal | 6 | 4 |
| Summons and complaint | 7 | 4 |
| Answer | 12 | 7 |
| Reply | 19 | 11 |
| Order of reference to committee | 20 | 11 |
| Stipulation waiving jury trial | 22 | 13 |
| Report of committee | 23 | 13 |
| Plaintiff's Exhibit C—Bill of sale, P. D. C. Ball to Ball Engineering Company | 37 | 21 |
| A—Assignment, George A. Carden to P. D. C. Ball | 40 | 23 |


JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 29, 1917.

| | Original. | Print |
|---|---|---|
| Defendant's Exhibit 8—Contract between Capt. W. P. Wooten, engineer, and Hubbard Building and Realty Co., July 10, 1906.. | 41 | 24 |
| 17—Letter, A. E. Waldron to Hubbard Building & Realty Co., October 22, 1909..... | 62 | 35 |
| 20—Letter, J. G. White & Co. to Capt. A. E. Waldron, May 18, 1910 ..... | 63 | 36 |
| 21—Contract between Capt. A. E. Waldron, engineer, and J. G. White and Co., Incorporated, approved June 6, 1910 ..... | 65 | 37 |
| 5—Letter, Ball Engineering Co. to Capt. A. E. Waldron, April 16, 1910..... | 92 | 54 |
| 6—Letter, Ball Engineering Co. to Capt. A. E. Waldron, March 16, 1910..... | 93 | 55 |
| 18—Letter, A. E. Waldron to Ball Engineering Co., April 28, 1910 ..... | 94 | 55 |
| 1—Letter, P. D. C. Ball to J. G. White & Co., June 8, 1910. | 96 | 57 |
| 2—Letter, P. D. C. Ball to Capt. A. E. Waldron, June 8, 1910. | 96 | 57 |
| 22—Letter, A. E. Waldron to Hubbard Building and Realty Co., June 6, 1910... | 97 | 58 |
| 23—Letter, A. E. Waldron to E. G. Williams for J. G. White & Co., June 6, 1910..... | 102 | 61 |
| 24—Letter, R. S. Smead, ass't engineer, to P. D. C. Ball, June 9, 1910..... | 103 | 62 |
| 25—Letter, A. E. Waldron to F. W. Ward, for J. G. White & Co., Inc., June 22, 1910.... | 107 | 64 |
| Defendant's Exhibits 25-1 and 25-2—List of property transferred to J. G. White & Co., Inc., and receipted for by it July 18, 1910..... | 108 | 65 |
| Plaintiff's Exhibit D—Letter, Capt. A. E. Waldron to Hubbard Building and Realty Co., November 10, 1910..... | 111 | 66 |
| E—Letter, A. E. Waldron to Hubbard Building and Realty Co., January 30, 1911..... | 113 | 68 |

| | Original. | Print |
|---|---|---|
| Defendant's Exhibit 30—Telegram, Bixby, chief engrs., to Capt. Waldron, February 3, 1911 | 115 | 70 |
| 32—Letter, A. E. Waldron to Hubbard Building & Realty Co., February 3, 1911 | 116 | 70 |
| 33—Letter, A. E. Waldron to John Ehrhardt, inspector, February 3, 1911 | 117 | 71 |
| Judgment | 118 | 72 |
| Stipulation as to record and bond | 121 | 73 |
| Stipulations extending time of clerk for filing record | 122 | 74 |
| Certification of clerk | 125 | 75 |
| Opinion *per curiam* | 126 | 76 |
| Judgment | 127 | 76 |
| Clerk's certificate | 129 | 77 |
| Writ of certiorari and return | 130 | 77 |

a United States Circuit Court of Appeals for the Second Circuit.

BALL ENGINEERING COMPANY, Plaintiff in Error,

against

J. G. WHITE AND COMPANY, Defendant in Error.

TRANSCRIPT OF RECORD.

Error to the District Court of the United States for the District of Connecticut.

[Stamped:] United States Circuit Court of Appeals, Second Circuit. Filed Dec. 28, 1916. William Parkin, Clerk.

1 The District Court of the United States for the District of Connecticut.

At Law. No. 813.

BALL ENGINEERING COMPANY

v.

J. G. WHITE & COMPANY.

*Petition for Writ of Error.*

The plaintiff in the above entitled action comes now by Cummings & Lockwood, its Attorneys, and says that on or about the 24th day of May, 1916, this Court entered judgment herein in favor of the defendant and against the plaintiff to recover of the plaintiff its costs.

That in said judgment and the proceedings herein had prior thereto in this action certain errors were committed to the prejudice of the plaintiff, all of which will in more detail appear from the assignment of errors which is on file with this petition.

Therefore, the plaintiff prays an order of this Court allowing said plaintiff to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Second Circuit, and that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Second Circuit for the correction of the errors so complained of and in accordance with the laws of the United States in such case made and provided. And that a transcript of the record and proceedings and exhibits and papers in this case duly authenticated may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated this 11th day of August, 1916.

CUMMINGS & LOCKWOOD,
*Attorneys for Plaintiff.*

2 Upon the filing of the foregoing petition for a writ of error and of an assignment of errors as therein stated, and upon motion of Cummings & Lockwood, attorneys for the plaintiff, it is

Ordered, that a writ of error be and is hereby allowed as in said petition prayed, and a bond with sufficient surety having heretofore been filed by the plaintiff to cover all costs in this action, execution upon said judgment is to be stayed.

Dated this 24th day of August, 1916.

HARLAND B. HOWE,
*United States District Judge.*

3 *Writ of Error.*

The District Court of the United States for the District of Connecticut.

At Law. No. 813.

BALL ENGINEERING COMPANY

v.

J. G. WHITE & COMPANY.

THE UNITED STATES OF AMERICA,
*District of Connecticut, ss:*

The President of the United States of America to the Judges of the District Court of the United States for the District of Connecticut, Greeting:

Because, in the record and proceedings as also in the rendition of the judgment of a complaint, which is in the District Court before you between the Ball Engineering Company of the State of Missouri, plaintiff, and *the* J. G. White & Company of the State of Connecticut, defendant, a manifest error hath happened to the great prejudice and damage of the plaintiff as is said and appears by its complaint.

We, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Judges of the United States Circuit Court of Appeals for the Second Circuit in the City of New York, together with this writ, so that you have the same at the said City of New York in the State of New York in said Circuit on the 22d day of September 1916, in the said Circuit Court of Appeals to be then and there held, that the

4 record and proceedings aforesaid being inspected, the said Judges of the Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States ought to be done.

Witness the Honorable Edwin S. Thomas, United States District Judge, this 24 day of August in the year of our Lord one thousand

nine hundred and sixteen, and of the Independence of the United States the one hundred and forty-first.

C. E. PICKETT,
*Clerk of the District Court of United States of America for the District of Connecticut, in the Second Circuit.*

The foregoing writ of error is hereby allowed this 24th day of August, 1916.

HARLAND B. HOWE,
*U. S. District Judge.*

5 The District Court of the United States for the District of Connecticut.

At Law. No. 813.

BALL ENGINEERING COMPANY

v.

J. G. WHITE AND COMPANY.

UNITED STATES OF AMERICA,
*District of Connecticut, ss:*

To J. G. White and Company, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Second Circuit to be holden at the City of New York in the State of New York within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Connecticut, whereby the Ball Engineering Company of Missouri is plaintiff-in-error, and you, J. G. White & Company of Connecticut, are defendant-in-error, to show cause, if any there should be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Hartford in the District of Connecticut this 24th day of August, 1916.

HARLAND B. HOWE,
*United States District Judge.*

Due and legal service of the above citation is hereby accepted for and on behalf of the defendant.

Dated at Hartford, Conn., August 27, 1916.

LEWIS SPERRY,
*Attorney for Defendant.*

6 The District Court of the United States for the District of Connecticut.

At Law. No. 813.

BALL ENGINEERING COMPANY, Plaintiff,

v.

J. G. WHITE & COMPANY, Defendant.

*Assignment of Errors and Prayer for Reversal.*

Now, on the 11th day of August, 1916, comes the plaintiff by Cummings & Lockwood, its attorneys, and prays for the reversal of the judgment entered in the above entitled case on or about the 24th day of May, 1916, in favor of the defendant and against the plaintiff, and as ground for reversal sets forth and files the following assignment of errors upon which it will rely upon the prosecution of the writ of error in the above entitled action:—

1. The Court erred in ruling and in sustaining the ruling and conclusion of the Committee, number 6 of his conclusions, contained in the report of the committee, that the Government of the United States took title to said property as sovereign, and that the defendant, which thereafter used the same, was not guilty of conversion.

2. The Court erred in sustaining the conclusion of the Committee number 7 of his conclusions, that judgment ought to be rendered in favor of the defendant.

3. The Court erred in entering judgment in said action in favor of the defendant and against the plaintiff.

Wherefore, said plaintiff prays that the judgment of said Court be reversed.

Dated at Hartford, Conn., August 11th, 1916.

CUMMINGS & LOCKWOOD,
*Attorneys for Plaintiff.*

7 *Summons and Complaint.*

UNITED STATES OF AMERICA,
*District of Connecticut, ss:*

The President of the United States of America to the Marshal of the District of Connecticut, Greeting:

You are hereby commanded to attach to the value of Twenty-five thousand ($25,000) Dollars the goods or estate of the J. G. White & Company, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, and a citizen of said State, and it summon to appear before the Circuit Court of the United States for the District of Connecticut, next to be held at Hartford, on the first Monday in June, A. D. 1911, then and there to answer unto Ball

Engineering Company a corporation organized and existing under and by virtue of the laws of the State of Missouri, and a citizen of said State of Missouri, in a civil action wherein the plaintiff complains and says:

1. The plaintiff, Ball Engineering Company, is and has been for a long time, and was at the several dates hereinafter mentioned, a corporation duly incorporated under the laws of the State of Missouri, and a citizen and resident of said State, having its domicile and principal place of business in the City of St. Louis, in said State of Missouri.

2. The defendant, J. G. White & Company, is and has been for a long time, and was at all the several dates hereinafter mentioned, a corporation incorporated under the laws of the State of Connecticut, and a citizen and resident of said State of Connecticut, having its domicile and principal place of business in the City of Bridgeport in said State of Connecticut.

8 3. On and before June 1, 1910, the plaintiff was the owner of certain personal property described and valued as follows: One anvil of the value of $12.00; 2 — 1 yd. bottom dump concrete buckets of the value of $150.00, being of the value of $75.00 each; 10 — 1½ yd. Western dump cars of the value of $875.00, being of the value of $87.50 each; 10 — Koppell 1 yd. cars of the value of $675.00, being of the value of $67.50 each; 1 — Derrick, cotton wood mast and boom with fittings and guy wires, both without hoisting cable standing on north end of wall of the value of $250.00; 1 — Derrick, steel mast and boom with fittings and guy wires, but without hoisting cables of the value of $1,300.00; 1 — Drill press of the value of $10.00; 2 — 3 drum hoisting engines of the value of $3,000.00, being of the value of $1,500.00 each; 1 — Forge of the value of $3.00; 1 — Grindstone of the value of $1.00; 1 — Jack screw of the value of $2.00; 1 — Smith-Vaile pump, 2″ discharge of the value of $75.00; 1 Smith-Vaile pump, 3″ discharge of the value of $100.00; 1 — pump 1½″ discharge of the value of $50.00; 1 — 3″ steam pipe line 600 ft. long of the value of $132.00; 1 — 2″ steam and water pipe line 294 ft. long of the value of $56.00; 1 — vise of the value of $4.00; 1 — Crosscut saw of the value of $3.00; blacksmith's blower and small tools of the value of $30.00; 1 — cement shed, 1 — blacksmith shop, 1 — material house and 1 — 2-story bunk house, all of the value of $500.00; 1 — mess room, 1 — kitchen and commissary, 1 — office building and three bunk houses, all of the value of $200.00; 1 — tramway 16 lbs. steel 11,407 ft. of track, 1 — tramway 20 lbs. steel 281 ft. of track and 86 lineal ft. loose rail, all of the value of $4,000.00; 1 — suspension bridge, 350 ft. span and 1 — still for water, both of the value of
9 $500.00; 1 — set derrick fittings of the value of $200; 14,502 ft. round piles of the value of $1,450.20; 11,020 ft. sheet piling ready to drive of the value of $385.70; 10,480 ft. sheet piling 12 x 12 ready to drive of the value of $419.52; 480 — bolts with washers ¾ x 12 of the value of $21.00 being of the value of $.04⅜ each; 1,100 lbs. nails of the value of $30.00, being of the value of $.02 8/11 each; 50 cords of wood of the value of $100.00, being of the value of $2.00 per cord; 22 gauges for pier of the value of $44.00, being of the value of $2.00 each; 8 — Capstan levers, 8 — Friction

roller arms, 8 — journal boxes for dam, 52 cast journals and 8 cast gate anchors, all of the value of $375.00.

4. On and before said date of June 1, 1910, said personal property was situated in the County of Ellis, in the State of Texas, at and near what was and is known as Lock and Dam No. 6 on the Trinity River.

5. On or about said date of June 1, 1910, the defendant, its servants, agents and employees, over the objections and protest of plaintiff and against plaintiff's express directions, unlawfully seized upon said personal property and converted the same to the use of the defendant.

6. The said property so seized and converted to defendant's use has never been restored to the possession or use of the plaintiff.

7. The said personal property was, at the time of said seizure and conversion, of the total value of Fifteen thousand (15,000) Dollars.

8. By reason of the said seizure and conversion of the said personal property, the plaintiff has been deprived of said property and the use thereof and has been damaged thereby.

10 The plaintiff claims twenty thousand (20,000) dollars damages.

Charles D. Lockwood of Stamford is recognized in the sum of One hundred-fifty (150) Dollars to prosecute, etc.

Of this writ, with your doings thereon, make due service and return.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, and the seal of the said Circuit Court at the City of Hartford, within the Second Circuit and the District of Connecticut, this 17th day of May, in the year 1911, and of the Independence of the United States of America the 135th.

R. F. CARROLL.
*Deputy Clerk.*

CUMMINGS & LOCKWOOD.
*Attorneys for Plaintiff.*

The above and foregoing is a true copy of the original complaint and summons.

Attest,

EDSON S. BISHOP,
*U. S. Marshal,*
By WILLIAM L. PARMELEE,
*Deputy U. S. Marshal.*

DISTRICT OF CONNECTICUT,
*Fairfield County, ss:*

BRIDGEPORT, May 19th, 1911.

Then and there by virtue hereof, I made service of this writ
11 by leaving a true and attested copy of the same with W. T. Hinks, as he is the agent of the J. G. White and Company, the within named defendant.

Attest,

EDSON S. BISHOP,
*United States Marshal.*
By WILLIAM L. PARMELEE,
*Deputy United States Marshal.*

Fees:—

| | |
|---|---|
| 18 miles travel | $1.08 |
| 1 service | 2.00 |
| | $3.08 |

12 BALL ENGINEERING COMPANY

v.

J. G. WHITE & COMPANY, Incorporated, Sued by the Name of J. G. White & Company.

UNITED STATES OF AMERICA,
*District of Connecticut, ss:*

*Answer.*

1. As to the allegations contained in paragraph 1, the defendant has not sufficient information to form a belief and leaves the plaintiff to his proof.

2. The allegations contained in paragraph 2 are admitted except that the name of the defendant J. G. White & Company, Incorporated, is therein erroneously stated as being J. G. White & Company.

3. As to the allegations contained in paragraph 3 of the complaint, the defendant denies the same and for further answer thereto says:

(*a*) On or about the 10th day of July, 1906, Captain W. P. Wooten of the Corps of Engineers, United States Army, acting for and in behalf of the United States of America, as party of the first part, entered into an agreement with the Hubbard Building and Realty Company, a corporation organized under the laws of the State of Texas, as party of the second part, wherein the said Hubbard Building and Realty Company agreed to construct lock and dam No. 6 in section one of the Trinity river, Texas, in accordance with plans and specifications attached to the said agreement and forming a part thereof, and wherein it was agreed that the said Hubbard
13 Building and Realty Company would complete the construction of said lock and dam not later than September 1st, 1908.

(*b*) Among other things it was provided in and by said agreement as follows:

"4. If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, and upon the giving of such notice all payments to the party or parties of the second part under this contract shall cease, and all money or reserved percentage due or to become due the said party

or parties of the second part, by reason of this contract, shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by the said United States in excess of those payable by the said United States during the period herein allowed for the completion of the contract by the party of the second part; and the party of the first part may deduct all the above-mentioned sums out of or from the money or reserved percentage retained as aforesaid; and upon the giving of the said notice the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials, by contract or otherwise in accordance with law.

14 "5. It is further agreed that if the party of the second part shall fail to prosecute the work covered by this contract so as to complete the same within the time agreed upon, the party of the first part may, with the prior sanction of the Chief of Engineers, in lieu of annulling the contract under the preceding paragraph, waive the time limit and permit the party of the second part to finish the work within a reasonable period, to be determined by the said party of the first part. * * *

It was further provided in the said specifications annexed to and forming a part of said agreement by the paragraph of said specifications numbered 33, as follows:

"Annulment.—In case of the annulment of this contract as conditionally provided for in the form of contract adopted and in use by the Engineer Department of the Army, the United States shall have the right to take possession of, wherever they may be, and to retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of same prepared for use or in use in the prosecution of the work, together with any or all leases, rights of way or quarry privileges, under purchase, at a valuation to be determined by the Engineer Officer in charge."

(c) The said Hubbard Building and Realty Company failed to complete the construction of said lock and dam under the terms of said agreement within the said period thereby limited, whereupon the United States granted extensions for the completion of the said construction, but said Hubbard Building and Realty Company failed within the time so extended to complete the construction of said lock and dam. The said Hubbard Building and Realty Company having failed to prosecute faithfully and diligently the work under the said agreement in accordance with the specifications and require-

15 ments thereof, and having failed to complete the construction of the said lock and dam within the time limited by said agreement as extended as aforesaid, in or about the month of June, 1910, the said agreement of the Hubbard Building and Realty Company was annulled pursuant to the provisions thereof, hereinbefore set forth, and notice of such annulment in writing was given to the Hubbard Building and Realty Company. Thereupon, and in or about the month of June, 1910, and pursuant to the said paragraph

numbered 33 of the specifications annexed to said agreement, the United States took possession of certain materials, tools, buildings, tramways and cars and other property prepared for use or in use in the prosecution of the work under said agreement at a valuation of about $11,578 determined by the engineer officer in charge and the said sum of $11,578 was thereupon paid to or credited to the account of the said Hubbard Building and Realty Company by the United States.

(*d*) The said Hubbard Building and Realty Company having failed to prosecute faithfully and diligently the work under its said agreement in accordance with the specifications and requirements thereof, and having failed to complete the construction of said lock and dam as aforesaid, and the United States having taken possession of said materials, tools, buildings, tramways, cars and other property at said valuation determined as aforesaid — the United States thereupon entered into an agreement with this defendant for the completion by this defendant of the construction of the said lock and dam No. 6 in the manner therein set forth, and the United States thereupon leased to this defendant said materials, tools, buildings, tramways, cars and other property, of which the Government had taken possession as aforesaid, at a monthly rental of about $380, and
16 this defendant thereafter duly and promptly paid to the United States said rental for the use of said property, and at all times thereafter, until the subsequent surrender of the same as hereinafter set forth to the United States, this defendant held possession thereof and used the same as the lessee of the United States, and with its authority.

(*e*) All of the several articles of property enumerated in the paragraph of the complaint herein numbered 3, were prepared for use or were in use in the prosecution of the work provided to be performed by said agreement of the Hubbard Building and Realty Company at the time said Company failed to prosecute the work in accordance with the specifications and requirements of the said agreement, and at the time the said Company failed to complete said work in accordance with said agreement. With the exceptions hereinafter set forth, after the said failures of the Hubbard Building and Realty Company to perform its said agreement, the United States took possession of all of said property enumerated in the paragraph of the complaint herein numbered 3, at a valuation of about $11,578 determined by the engineer officer in charge, in pursuance of the above quoted provisions of the said agreement of the said Hubbard Building and Realty Company. With the exceptions hereinafter set forth, all of the said property enumerated in the said paragraph of the complaint numbered 3, and which the plaintiff alleges was converted by this defendant to its own use, was the same property which is hereinbefore referred to in subdivisions (*c*) and (*d*) of this paragraph numbered 3 of the answer and which was prepared for use or in use in the construction of the said work at the time of the said failure of the Hubbard Building and Realty Company to perform its said agree-

ment, and was located at or near the immediate vicinity of
17 said lock and dam No. 6 upon land belonging to or in the possession of the United States. The exceptions to which reference is above made are that the United States did not take possession of 14,502 feet of round piles, nor of 11,020 feet of sheet piling ready to drive, nor of 10,480 feet of sheet piling, 12 x 12, ready to drive, which said amounts are set forth in the said paragraph of the complaint numbered 3, but did take possession in the manner aforesaid of about 13,120 feet of round piles and of about 10,768 feet of sheet piling ready to drive and of about 9,552 feet of sheet piling, 12 x 12, ready to drive.

(*f*) Prior to the commencement of this suit the construction of said lock and dam No. 6 on the Trinity river in the State of Texas was completed, and also prior to the commencement of this action this defendant relinquished possession to the United States of all of said property referred to in subdivisions (*c*), (*d*) and (*e*) of this paragraph of this answer and in the paragraph of the complaint herein numbered 3, in possession of which this defendant has been as lessee thereof from the United States as aforesaid, except that in said paragraph numbered 3 of the complaint the amount of piling is inaccurately set forth as hereinbefore stated in this paragraph of this answer, and except that this defendant did not relinquish possession to the United States of a certain portion of the said materials which had theretofore been supplied for the prosecution of the work provided to be performed under the said agreement between the United States and the said Hubbard Building and Realty Company, which said materials were with the consent of the United States actually used by this defendant and became a part of the said work and of the said lock and dam No. 6.

4. As to the allegations of paragraph 4 of the complaint
18 this defendant denies the same, except that it admits that on or about June 1st, 1910, the property referred to in the foregoing paragraph numbered 3 of this answer, which this defendant is informed and believes and ther-fore alleges is the same property as that described in the paragraph of the complaint numbered 3 (except that in said paragraph 3 of the complaint the amount of piling is inaccurately set forth as stated in subdivision (*e*) of the foregoing paragraph numbered 3 of this answer), was situated in the County of Ellis, in the State of Texas, at and near what was and is known as lock and dam No. 6 on the Trinity river.

5. The allegations of paragraph 5 of the complaint are denied.

6. As to the allegations of paragraph 6, this defendant denies that it ever seized and converted any of said property referred to in the complaint or in this answer to its own use, and further alleges that previous to the commencement of this suit, this defendant as lessee as aforesaid surrendered possession of the said property to the Government of the United States as the owner thereof, and at the time of the commencement of this suit, and for a long time before, this defendant did not have possession of said property nor any part thereof, and did not assert or claim any right, title or interest therein.

7. The allegations of paragraphs 7 and 8 of the complaint are denied.

Dated, August 19th, 1911.

J. G. WHITE & COMPANY, INCORPORATED,
*The Above-named Defendant,*
By BYRNE & CUTCHEON AND LEWIS SPERRY,
*Attorneys.*

10 United States of America, District Court, District of Connecticut, October 27, 1911.

BALL ENGINEERING COMPANY

v.

J. G. WHITE & COMPANY.

*Reply.*

1. As to the allegations contained in paragraph 3 (*a*), (*b*), (*c*), (*d*) and (*f*) of the answer the plaintiff has not sufficient information to form a a belief.

2. The allegations contained in paragraph 3 (*e*) are denied.

3. The following allegations of paragraph 6 are denied:

"That previous to the commencement of this suit, this defendant as lessee as aforesaid surrendered possession of the said property to the Government of the United States as the owner thereof."

As to the other allegations of said paragraph 6, the plaintiff has not sufficient information to form a belief.

BALL ENGINEERING COMPANY,
By CUMMINGS & LOCKWOOD,
*Its Attorneys.*

20 In the United States District Court, in and for the District of Connecticut.

At Law. No. 813.

BALL ENGINEERING COMPANY

v.

J. G. WHITE COMPANY.

*Order.*

The above entitled case, the pleadings having been closed to the Court and said case having been noticed for trial, came on to be heard at the February 1916 Term of the United States District Court in the District of Connecticut held at the United States Court Rooms, Post

Office Building, in the City of New Haven, Connecticut, on the 13th day of March, 1916.

Present, the Honorable Edwin S. Thomas, United States District Judge of the District of Connecticut, and upon the annexed stipulation of attorneys for the plaintiff and the defendant it is hereby

Ordered: that said action be and the same hereby is referred to George D. Watrous, Esquire, of New Haven, as sole Committee to hear and determine the same and report his findings of fact and conclusions of law with all convenient speed, with the same force and effect as if said action had been brought before the Court and jury, and that the report of said Committee shall be treated by the Court for the purpose of entering judgment thereon, as though it were the special verdict of the jury, and shall have the same force and effect as though it were the special verdict of a jury. No waiver of exceptions to evidence is intended hereby. And it is further

Ordered: that the hearings before said Committee shall proceed with all due diligence and speed to the end that the findings of fact and conclusions of law may be promptly had, and it is further

Ordered: that no judgment shall be entered herein until after ten days' notice of the filing of the report of the Committee and of the judgment proposed to be entered thereon. And it is further

Ordered: that the fees of said Committee and of the stenographer employed to take testimony in said cause shall be taxed as costs and paid in the first instance, one-half by each party.

Dated at New Haven, Conn., this 13th day of March, 1916.

EDWIN S. THOMAS,
*United States District Judge.*

*Stipulation.*

We hereby consent to the entry of the foregoing order.

CUMMINGS & LOCKWOOD,
*Attorneys for Plaintiff.*
J. KEMP BARTLETT,
LEWIS SPERRY,
*Attorneys for Defendant.*

22 In the United States District Court, in and for the District of Connecticut.

At Law. No. 813.

BALL ENGINEERING COMPANY

v.

J. G. WHITE COMPANY.

*Stipulation.*

We, the attorneys for the respective parties hereto hereby waive the trial to the jury of this cause, and agree to submit same to the Court, without intervention of the jury.

Dated at New Haven, Connecticut, this eighth day of October, 1912.

CUMMINGS & LOCKWOOD,
*Attorneys for Plaintiff.*
LEWIS SPERRY,
*Attorney for Defendant.*

23 In the United States District Court, in and for the District of Connecticut.

At Law. No. 813.

BALL ENGINEERING COMPANY

v.

J. G. WHITE COMPANY.

*Report of Committee.*

To the Honorable District Court of the United States for the District of Connecticut:

The undersigned, having been appointed by this Honorable Court, sole Committee to hear and determine the above entitled cause, and to report his findings of fact and conclusions of law therein, by Order dated the 13th day of March, 1916, pursuant to stipulation of counsel, annexed thereto, respectfully submits his report as follows:

1. On the 21st day of March, 1916, the parties appeared before him by counsel only; being at issue upon the same pleadings as on the original trial of said action, as appears on file.

The Committee having been duly sworn, and the parties having stipulated that all of the evidence submitted to the Committee at the former trial should be submitted as all of the evidence at this trial, no further testimony was offered.

The findings of fact are the same as submitted at the former trial, except that certain exhibits admitted in evidence at the former trial

are, at the request of counsel, annexed hereto and by reference made a part hereof; the conclusions of law being in conformity with the decision of the Honorable United States Circuit Court of
24 Appeals for the Second Circuit upon a writ of error to this Court, after the rendition of the judgment of this Court, after the former trial.

2. It was admitted that the corporate name of the defendant was "J. G. White & Company, Incorporated," and the Committee so finds.

3. On or about April 2nd, 1910, the plaintiff, "Ball Engineering Company," was incorporated under the laws of the State of Missouri, with a capital stock of $50,000, divided into 500 shares of the par value of $100 each. Ever since the incorporation of the plaintiff, Ball Engineering Company, said P. D. C. Ball has been the president and a director of said Ball Engineering Company, and the holder and owner of 498 out of the 500 shares of stock of said company. On the 2nd day of April, 1910, said P. D. C. Ball was the owner of the personal property described in the complaint, and on said day executed and delivered to the plaintiff, Ball Engineering Company, an instrument, a copy whereof is hereto annexed and by reference made a part hereof, marked "Plaintiff's Exhibit C," whereby said P. D. C. Ball sold and delivered to said Ball Engineering Company, among other things, all of the property described in the complaint, and in "Plaintiff's Exhibit A," a copy of which is hereto annexed, whereby said property had been theretofore sold by one George A. Carden to said P. D. C. Ball. Said property was then situated upon land belonging to the United States, known as the site of Lock and Dam No. 6, on the Trinity River, in County of Dallas, in the State of Texas.

4. On the 10th day of July, 1906, the United States entered into a contract with the Hubbard Building & Realty Company, a corporation organized under the laws of the State of Texas, whereby said Company agreed to construct lock and dam No. 6 in accordance with the plans and specification forming a part of said agreement,
25 which agreement, marked "Defendant's Exhibit 8," a copy of which is hereto annexed and by reference made a part hereof.

5. In or about the year 1905, a partnership was formed by and between George A. Carden of Dallas, Texas, and P. D. C. Ball of St. Louis, Missouri, which was known as the "Ball Carden Company;" during the twelve months prior to September, 1909, said partnership purchased the property enumerated in paragraph 3 of the complaint herein; the great majority thereof was new when placed on the site of said lock and dam, and all of said property was purchased with moneys furnished by said P. D. C. Ball; said property was placed by said copartnership at the site of said lock and dam No. 6 and was thereafter and until in or about the month of May, 1909, used by said copartnership in the construction of said lock and dam.

6. The said Hubbard Building & Realty Company having failed to complete the construction of said lock and dam within the period of time limited by the contract between the said Hubbard Building & Realty Company and the United States, on or about the 21st day of August, 1908, an application was made in the name of the said Hub-

bard Building & Realty Company by the said George A. Carden as president of said company for an extension of the time for the completion of said lock and dam until eight months from September 1, 1908. Said extension of time so requested was granted by the United States Government. The said lock and dam not having been completed prior to May 1, 1909, on or about May 29, 1909, a request for a further extension was made by a letter dated May 29, 1909, signed in the name of the Hubbard Building & Realty Company by said George A. Carden as president of that company. Said further extension was granted by the Government of the United States.

26 7. In April or May, 1909, said partnership was dissolved, and discontinued the work theretofore carried on by it in the construction of said lock and dam No. 6. On or about the 24th day of July, 1909, said George A. Carden executed and delivered to said P. D. C. Ball an instrument, a copy whereof is hereto annexed and by reference made a part hereof, being "Plaintiff's Exhibit A" as marked in evidence herein, whereby said George A. Carden sold and delivered to said P. D. C. Ball all of his right, title and interest in and to all of the personal property of every kind and description, including material, machinery and appliances, belonging to the said partnership between the said George A. Carden and the said P. D. C. Ball, known as the "Ball-Carden Company," used in connection with or located at or near lock and dam No. 6, then in process of construction by the United States Government at Trinity River below Dallas, Texas, in the County of Dallas, said property being the same described in paragraph "3" of the complaint herein.

8. After the dissolution of the said copartnership between said George A. Carden and said P. D. C. Ball, and until on or about September 8, 1909, said P. D. C. Ball, operating under the name of the "Ball Engineering Company," continued the work of constructing the said lock and dam No. 6, using for that purpose the said property referred to in said paragraph "3" of the complaint herein, sold to him as aforesaid by said George A. Carden.

9. From about June 1, 1909, until the incorporation of the plaintiff, Ball Engineering Company, one Oscar Shanks was the personal representative at the site of said lock and dam No. 6 of said P. D. C. Ball, doing business under the name of "Ball Engineering Company," and was the general superintendent of said P. D. C.

27 Ball at the site of the said lock and dam No. 6 and as such representative and superintendent was in charge of the construction work upon said lock and dam No. 6 from on or about June 1, 1909, until on or about September 8, 1909, at which time said work ceased.

10. During the period when said Shanks was present at the site of said lock and dam No. 6, and in charge of the work of constructing said lock and dam, as aforesaid, he saw, and had in his possession, the plans and specifications contained in "Defendant's Exhibit 8," hereinbefore referred to, which were turned over to him by his predecessor. During said period said Shanks, from time to time, discussed such portions of said specifications (as were necessary) in the construction of the work with Captain A. E. Waldron, the engineer officer of the United States Government in charge of the work of constructing said lock and dam, and said Shanks carried on the work of

constructing said lock and dam, as aforesaid, under the direction of said P. D. C. Ball. No portion of the property mentioned in the complaint was brought upon the work after the arrival of Mr. Shanks at lock and dam No. 6.

11. On September 9, 1909, work upon said lock and dam No. 6 was abandoned. On October 22, 1909, notification of the annulment of said contract pursuant to its provisions was given to the Hubbard Building & Realty Company by letter of that date signed by A. E. Waldron, Captain Corps Engineers, U. S. A., a copy whereof is hereto annexed and by reference made a part hereof, marked "Defendant's Exhibit 17."

12. On dates beginning January 4, 1909, and ending September 8, 1909, ten checks were issued and signed by A. E. Waldron, Captain Corps Engineers, U. S. A., payable to the order of the said Hubbard Building & Realty Company in payment of vouchers issued in favor of said Hubbard Building & Realty Company approved
28 by said Captain A. E. Waldron for work done and material furnished on said lock and dam No. 6, Trinity River, Texas, and each of said checks bore the endorsements "Hubbard Building & Realty Company by George A. Carden, President" and "Pay to the Order of National Bank of Commerce, P. D. C. Ball;" the only variations from such endorsements being on one of said checks dated January 4, 1909, whereon the endorsements were as follows: "Hubbard Building & Realty Company by George A. Carden, President;" and "P. D. C. Ball." Each of said checks bore on its face the following statement: "State object for which drawn," under which the following further statement appeared on each of said checks: "Constructing Lock and Dam No. 6, Trinity River, Texas." Ten other checks were issued and signed, five by W. P. Wooten, Captain Corps of Engineers, U. S. A., and five by Captain A. E. Waldron, Corps of Engineers, U. S. A., dated respectively on dates beginning December 7, 1907, and ending August 7, 1909, payable to the order of the Hubbard Building & Realty Company, in payment of vouchers issued in favor of the Hubbard Building & Realty Company, five of which were approved by said Captain W. P. Wooten, and five by said Captain A. E. Waldron, for work done and material furnished on lock and dam No. 6, Trinity River, Texas. Each of said last mentioned ten checks bore the following endorsement: "Hubbard Building & Realty Company by George A. Carden, President." Another check was issued, signed by Captain W. P. Wooten, Corps of Engineers, U. S. A., dated November 18, 1907, and payable to the order of the Hubbard Building & Realty Company, in payment of a voucher issued in favor of the Hubbard Building & Realty Company, and approved by said Captain W. P. Wooten, for work done and material furnished on lock and dam No. 6, Trinity River, Texas. Said
29 last mentioned check bore the following endorsements: "Hubbard Building & Realty Company, G. E. White, Secty." and "The Southern Trading Company, G. E. White, V. Pt." All of the above mentioned checks bore upon their face the following statement: "State object for which drawn," under which the following further statement appears on each of said checks, "Constructing lock and dam No. 6, Trinity River, Texas."

13. After the time of the incorporation of the plaintiff, Ball En-

gineering Company, the said Oscar Shanks was in the employ of said company and was representative and superintendent of said company at the site of the work on said lock and dam No. 6, and also at locks and dams Nos. 2 and 4, on the said Trinity River.

14. It did not appear under what circumstances either the plaintiff or said P. D. C. Ball, operating under the name of the Ball Engineering Company, undertook to perform said work or furnish said material, nor did it appear under what circumstances said Ball-Carden Company entered upon said work, other than that this was done without the actual knowledge of said P. D. C. Ball, who did not learn thereof until two or three months later.

15. Pursuant to advertisement dated April 30, 1910, a contract, dated May 18, 1910, and approved June 6, 1910, was entered into between the United States and the defendant for the completion of lock and dam No. 6. On May 18, 1910, the original contract was forwarded by the defendant to Captain A. E. Waldron, with a letter of even date, a copy of which, marked "Defendant's Exhibit 20" is annexed hereto and by reference made a part hereof. A copy of this said agreement, marked "Exhibit 21" is annexed hereto and by reference made a part hereof.

16. On April 16th, 1910, and on March 16th, 1910, re-
30 spectively, the plaintiff sent to said Captain A. E. Waldron two letters, copies of which are hereto annexed, marked "Defendant's Exhibits 5 and 6" and by reference made a part hereof. On April 28th, 1910, said Waldron sent to the plaintiff a letter, of which a copy is hereto annexed, marked "Defendant's Exhibit 18," and by Reference made a part hereof. Prior to the making of said contract, one F. G. Ward and one E. G. Williams, employees of the defendant, attempted, in behalf of the defendant, without success, to agree with the plaintiff for the purchase or rental of the personal property and materials specified in the complaint, and on June 8, 1910, a notice, signed in the name of said P. D. C. Ball, by Oscar Shanks, was sent to the defendant, stating that said property did not belong to the Hubbard Building and Realty Company but that it was the personal property of said P. D. C. Ball, a copy whereof is hereto annexed, marked "Defendant's Exhibits 1 and 2."

17. On June 6, 1910, Captain A. E. Waldron, United States Engineer, in charge of said work, notified by letter the Hubbard Building & Realty Company that the defendant had requested the United States to take the articles of personal property specified in the complaint, and a portion of the materials, pursuant to the provisions of the contract with the Hubbard Building & Realty Company, and that they "are taken possession of under the provisions of paragraph 33 of the original specifications which form a part of the contract," and requested that the remainder of said material be removed within thirty days. A copy of this notification was sent to the plaintiff. A copy of said letter, marked "Defendant's Exhibit 22" is hereto annexed and by reference made a part hereof. A letter was sent on June 6th, 1910, by said Captain Waldron to the defendant a copy of which, marked "Defendant's Exhibit 23" is hereto annexed
31 and by reference made a part hereof. On June 9th, 1910, a letter was written by R. C. Snead, Assistant Government En-

gineer, to Mr. P. D. C. Ball, a copy of which letter, marked "Defendant's Exhibit 24" is hereto annexed, and by reference made a part hereof.

18. On said June 6, 1910, Captain Waldron notified the defendant of the action taken by him, and stated: "The fact that the material and machinery is on the Government reservation or in the near vicinity thereof, and the circumstances under which this office has not permitted its removal from the locksite, is sufficient to assume that the Government has taken possession of the items you speak of at the present time. They are therefore turned over to you under the conditions contained in Insert E, following paragraph 38 of the specifications for the construction of lock and dam No. 6, Trinity River, Texas, for use in further work on lock and dam No. 6, Trinity River, Texas."

19. On June 22, 1910, Captain A. E. Waldron, the engineer officer in charge, notified the defendant that the Hubbard Building & Realty Company, had been directed to remove all property at said lock and dam No. 6, except that specified in said letter, and determined the valuation of said property at the sum of $11,578, and fixed a monthly rental of $380 therefor from the government to the defendant. He also fixed a valuation upon the materials at the locksite and notified the defendant to take such of them as it deemed proper, at such valuations respectively.

20. The plaintiff refused to assent to either valuation.

21. On July 18, 1910, the defendant receipted to the United States government for the articles constituting said plant, and for such of the materials as it was willing to and did receive. A form of receipt was sent by Captain Waldron to the defendant on June 22nd,
32 1910, with a letter, a copy of which, marked "Defendant's Exhibit 25" is annexed hereto and by reference made a part hereof.

22. On August 5, 1910, Captain Waldron notified the Hubbard Building & Realty Company and Mr. P. D. C. Ball that of the materials on hand the defendant had taken 13,120 lineal feet of round piling, 10,768 of sheet piling, and 9,552 feet of Wakefield piling; 480 bolts, with washers ¾ x 12; 1,100 lbs. nails; 50 cords of wood; 22 foot gauges for piers; 8 capstan levers; 8 friction roller arms; 8 journal boxes for dam; 8 cast gate anchors; 52 cast journals upon which articles, exclusive of the piling, a valuation of $570 had been placed by him, and notified said Company and said Ball to remove the balance within thirty days. It did not appear that the balance was ever removed. The total valuation assessed by Captain Waldron upon the material taken by the defendant and incorporated in the work was $2,640.96.

23. On June 22, 1910, Captain A. E. Waldron forwarded to the defendant a memorandum invoice and receipt for the articles constituting the plant, and for such of the materials as the defendant was willing to and did receive, and on July 18, 1910, the defendant signed and delivered to the United States government a receipt for said plant and material theretofore turned over to it by said Captain A. E. Waldron, as aforesaid.

24. On or about July 6, 1910, the defendant commenced work on lock and dam No. 6, and made use of the property belonging to the

plaintiff and described in the complaint, with the exception of 1,382 feet of round piling, 252 feet of sheet piling ready to drive, and 928 feet of sheet piling 12 x 12 ready to drive, and paid to the United States a rental of $380 per month, or was credited therewith, for use of the plant.

25. On or before the completion of said lock and dam No.
33 6, by the defendant, the property, other than materials taken and used by the defendant, was returned to the United States, and by it offered to the Hubbard Building & Realty Company and to said Ball, neither of whom accepted said property.

26. The United States neither paid, credited nor tendered either purchase price or rental of said property to the plaintiff or to the Hubbard Building & Realty Company, except that in the final account between the United States and the Hubbard Building & Realty Company, after the completion of the work, the United States gave credit to the Hubbard Building & Realty Company for the value of said personal property and materials at the valuation determined by the engineer officer in charge. After the deduction of this credit, a balance was by the account shown to be due from the Hubbard Building & Realty Company to the United States.

27. The United States tendered to the Hubbard Building & Realty Company from time to time certain articles which the defendant no longer needed. On November 10, 1910, a letter was written by A. E. Waldron, Captain Corps of Engineers, to the Hubbard Building & Realty Company, a copy of which is hereto annexed, marked "Plaintiff's Exhibit D," and upon the completion of the work a letter, dated January 30, 1911, marked "Plaintiff's Exhibit E," a copy whereof is hereto annexed, was written by Captain A. E. Waldron to the said Hubbard Building & Realty Company, whereby an offer was made to relinquish to said Hubbard Building & Realty Company certain items of said personal property therein described. This offer was never accepted, and no part of said personal property was removed from the site of lock and dam No. 6, either by the plaintiff or by the Hubbard Building & Realty Company.

34 28. Thereafter the Chief of Engineers of the United States Army by telegram dated Washington, D. C., February 3, 1911, directed to said Captain A. E. Waldron, a copy whereof is hereto annexed and marked "Defendant's Exhibit 30," instructed said Captain Waldron to withdraw his said letter of January 30, 1911, to the Hubbard Building & Realty Company and to retain possession of all of said personal property until further advised by the office of said Chief of Engineers.

29. Thereafter and on February 3, 1911, said Captain A. E. Waldron wrote a letter to the Hubbard Building & Realty Company, a copy whereof is hereto annexed and marked "Defendant's Exhibit 32," wherein it was stated that said Waldron was in receipt of telegraphic instructions from the Chief of Engineers at Washington directing that he withdraw his said letter of January 30, 1911, to the Hubbard Building & Realty Company and retain possession of all said plant until further advised by said Chief of Engineers, and a copy of said letter was sent to the said Chief of Engineers of the United States Army, to said P. D. C. Ball and to the defendant.

30. On February 3, 1911, said Waldron also wrote a letter to John

Ehrhardt, United States inspector upon the work on lock and dam No. 6, a copy of which is hereto annexed and marked "Defendant's Exhibit 33," wherein said Waldron stated that in view of the instructions from the Chief of Engineers said Ehrhardt should under no circumstances allow the Hubbard Building & Realty Company or any other claimant to take possession of any item of property or machinery at said lock and dam No. 6.

31. After the return of said property by the defendant to the United States Government the said property remained at the site of said lock and dam No. 6 in the possession of the United States Government.

35 32. In the accounts between the United States and the Hubbard Building & Realty Company kept at the office of the Engineer of the United States at Dallas, Texas, entries were first made by employees of the United States crediting to the Hubbard Building & Realty Company the same rental which was charged against the defendant for the use of said property, but thereafter and after the receipt by said Waldron of the telegram of February 8, 1911—"Defendant's Exhibit 30"—a copy whereof is hereto annexed, said credits of said rental were canceled and the said Hubbard Building & Realty Company was credited with the valuation of said property determined by the Engineer officer in charge.

The following conclusions have been reached, so as to conform to the said decision of the Honorable Circuit Court of Appeals:

1. That on or about the sixth day of June, 1910, the Government of the United States, under the circumstances and in the manner hereinbefore set forth, took possession of the personal property described in the complaint, with the exception of the following articles: 1,382 feet of round piles; 252 feet of sheet piling ready to drive; and 928 feet of sheet piling 12 x 12 ready to drive, and on or about July 6th, 1910, delivered the same to the defendant, which took possession of and used the same.

2. That on the sixth day of July, 1910, the fair market value of said property so taken at the site of Lock and Dam No. 6 was $15,000.

3. That paragraph 33 of the specifications, forming a part of the agreement with the Hubbard Building & Realty Company, approved July 28th, 1906, which reads as follows:

"33. Annulment.—In case of the annulment of this con-
36 tract as conditionally provided for in the form of contract adopted and in use by the Engineering Department of the Army, the United States shall have the right to take possession of, wherever they may be, and to retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of same prepared for use or in use in the prosecution of the work, together with any or all leases, rights of way or quarry privileges, under purchase, at a valuation to be determined by the Engineer Officer in charge;"

does not, as a matter of law, authorize the United States to purchase materials, tools, etc., belonging to a third party, in the absence of agreement of the owner to assent to the provisions of Paragraph 33.

4. That said paragraph 33 does not authorize the United States to purchase materials, tools, etc., prepared for use in or use in the prose-

cution of the work save on payment to the owner thereof at a valuation to be determined by the Engineer Officer in charge.

5. That said paragraph 33 does not authorize the United States to retain materials, tools, etc., whether the property of the contractor or of other parties, upon payment of a rental value to be determined by the Engineer Officer in charge, and the United States did not acquire any title to or right to the possession of said property by virtue of paragraph 33.

6. That the Government of the United States took title to said property as sovereign, and on or about the sixth day of July, 1910, leased said property to the defendant, and the defendant took possession thereof and thereafter used the same, but was not guilty of conversion by reason thereof.

7. That judgment ought to be rendered in favor of the defendant.

Respectfully submitted,

GEORGE D. WATROUS,
*Committee.*

New Haven 26th day of April, 1916.

37 PLAINTIFF'S EXHIBIT C.

M. W. C., Mar. 6, 1913.

Know all men by these presents, That I, P. D. C. Ball, of the City of St. Louis, State of Missouri, in consideration of Fifty Thousand Dollars ($50,000.00) to me paid by Ball Engineering Company (a corporation organized under the laws of the State of Missouri, and doing business in the City of St. Louis and State of Missouri), the receipt whereof is hereby acknowledged, do hereby Grant, Bargain, Sell, Convey, Transfer and Deliver unto the said Ball Engineering Company, the following property located in Dallas, Kauffman and Ellis Counties, in the State of Texas, to-wit:

A certain narrow-gauge railroad and all spurs and connections consisting of 20-pound rails, spikes, fish-plates, bolts, ties, frogs, switches, culverts, cattle guards, grade, and all bridges including the bridge across Parson's Slough, and the right-of-way in connection therewith, said railroad commencing at Kleburg, in Dallas County, State of Texas, and extending to Lock and Dam No. 2 on the Trinity River and adjacent thereto, and consisting of approximately 7½ miles of railroad track and the aforesaid appurtenances thereto; together with approximately 8,000 more or less ties piled up along the aforesaid railroad track.

A certain narrow-gauge railroad in Kauffman and Ellis Counties, State of Texas, together with all spurs and connections therewith, consisting of 16-pound rails, spikes, fish-plates, bolts, ties, frogs, switches, turntables, grade, cattle guards, right-of-way, and all adjuncts and appurtenances thereto, said railroad commencing at Lock and Dam No. 6 on the Trinity River and extending to a certain gravel pit and consisting approximately of 3 miles of railroad track.

A certain suspension bridge, tracks thereon and all appurtenances

thereto crossing the Trinity River at Lock and Dam No. 6
38 in Kauffman and Ellis Counties, State of Texas.

Gravel Bins at Lock No. 6, and gravel bins, towers, screens and appurtenances at gravel pit near Lock and Dam No. 6.

1 Narrow-gauge Locomotive and all appurtenances thereto; 2 Narrow-gauge Flat Cars; 12 Narrow-gauge 3-yard Dump Cars; 1 Narrow-gauge Gasoline Hand Car; 15 Koppel Steel Dump Cars; 14 Western Dump Cars; 1 Gasoline Engine with rotary Gravel Screen complete, with gravel bins and appurtenances on the Glenn Farm; 2 Lidgewood Cableways complete with engines, towers, cables, ropes, travellers, wheels and axles, rails, spikes, fish-plates and ties, boilers and all appurtenances thereto; 2 Steel Derricks complete with sheaves, bull wheels, tackle, rope and all appurtenances thereto; 2 — 9" x 12" Triple Drum, double-cylinder Carlin Engines complete with swinging gear and appurtenances; 1 — 40 H. P. 8½" x 12" Double-Cylinder Flory Triple Drum Engine with swinging gear; 1 — 16 H. P. 6¼" x 8" Double-Cylinder Flory Side Stand Engine No. 88; 2 — Double-Drum Double-Cylinder Reliance Engines with 2 — 30 H. P. Boilers complete and all appurtenances thereto; 1 — Double-Drum Engine; 1 — Blakeslee Gas Engine; 2 — 40 H. P. Horizontal Fire Box Boilers with all appurtenances thereto; 3 — 30 H. P. Horizontal Fire Box Boilers with all appurtenances thereto; 1 — 30 H. P. Vertical Boiler with all appurtenances thereto; 1 — Saw Mill and Engine complete at Lock and Dam No. 2; 1 — Saw Mill and Engine complete at Lock and Dam No. 4; 6 — Smithvale Water Pumps 8" x 5" x 10"; 2 — 4" Centrifugal Pumps; 2 — Small Duplex Pumps; 1 — 10" x 16" Pump Engine; 1 — Small Vertical Engine; 1 — No. 5 Smith Concrete Mixer with en-
39 gine complete, and all appurtenances thereto; 2 — Bartlett Steam Pile Driver Hammers, complete with hose, connections and appurtenances thereto; 1 — 2,800-pound Drop Hammer; 1 — 2,000-pound Drop Hammer; 4 Pairs of Pile Driver Leads complete for Drop and Steam Hammers; 2 — Pairs of Swinging Pile Driver Leads complete for Drop and Steam Hammers; 1 — Buick Automobile; 1 — H. P. Road Roller at Grand Prairie, Texas; 20 — Mules, 4 — Log Wagons; 3 — Farm Wagons; 2 — Buggies; together with all equipment, machinery, pipes, iron, steel, cement, lumber, piling, bolts, nails, spikes, tools and appliances in the aforesaid counties and at Locks and Dams No. 2, 4 and 6 on Trinity River aforesaid, also all repair and hand tools, blacksmith shop equipment, camp equipment, bunk houses, office buildings, office equipment including typewriters, books, desks, tables, chairs, cupboards, files and all other property and things which may be regarded as a part of or appurtenant to the aforesaid property herein conveyed, located in said Dallas, Ellis and Kauffman Counties in the State of Texas;

To have and to hold all and singular, the aforesaid property to the said Ball Engineering Company and its successors and assigns, to its and their own use and behoof forever.

And I hereby covenant with the said grantee that I am the lawful owner of the said property; that it is free from all encumbrances; that I have good right to sell the same as aforesaid, and that I will warrant and defend the same against the lawful claims and demands of all persons.

In witness whereof, I, the said P. D. C. Ball hereunto set my hand and seal this second day of April, 1910.

(Signed) P. D. C. BALL.

Attest,

(Signed) S. T. SWARTZ.

40 STATE OF MISSOURI,
*City of St. Louis, ss:*

On this 5th day of April, 1910, before me personally appeared P. D. C. Ball, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal at my office in the City of St. Louis, the day and year first above written.

My commission expires Jan. 6, 1912.

[SEAL.] A. G. LATIMER,
*Notary Public, City of St. Louis, Missouri.*

Plaintiff's Exhibit A.

PLAINTIFF'S EXHIBIT A.

M. W. C., Mar. 6, 1913.

Know all men by these presents, That I, the undersigned, George A. Carden, of the City of Dallas, State of Texas, in consideration of the sum of One Dollar ($1.00) to me paid by P. D. C. Ball, of the City of St. Louis, State of Missouri, receipt of which is hereby acknowledged, and for other good and valuable considerations, receipt of which is hereby acknowledged, hereby sell, assign, set over and deliver unto the said P. D. C. Ball, all of my right, title and interest in and to all of the personal property of every kind and description, including material, machinery, and appliances, belonging to the partnership of Ball-Carden Company, used in connection with or located at or near Lock and Dam No. 6 now in process of construction by the United States Government at Trinity River below Dallas,
41 Texas, being in the County of Dallas, State of Texas.

Witness, my hand this 24th day of July, 1909.

(Signed) GEORGE A. CARDEN.

Attest:

(Signed) F. LEE WILLIAMS.

DEFENDANT'S EXHIBIT 8.

M. W. C., Mar. 10, 1913.

Form 19*a*.

Authorized April 30, 1896.

With Amendments to April 15, 1902.

*Articles of Agreement.*

Entered into July 10, 1906 between Captain W. P. Wooten, Corps of Engineers, U. S. Army, of the one part, and Hubbard Building & Realty Co., of the other part, for constructing Lock and Dam No. 6, Trinity River, Texas. 19 bps. attached.

*Advertisements, Instructions, Specifications, Proposals, etc., for Improving Trinity River, Texas. Construction of Lock and Dam No. 6.*

Advertisement.

United States Engineer Office.

Federal Building.

DALLAS, TEXAS, April 12, 1906.

Sealed proposals for building lock and dam No. 6 on Trin-
42 ity River, Texas, will be received here until 12 M., May 28, 1906, and then publicly opened. Information furnished on application.

W. P. WOOTEN,
*Capt. Engrs.*

*Specifications.*

General Instructions for Bidders.

1. The attention of bidders is especially invited to the Acts of Congress approved February 26, 1885, and February 23, 1887, as printed in Vol. 23, page 332, and Vol. 24, page 414, United States Statutes at Large, which prohibit the importation of foreigners and aliens, under contract or agreement, to perform labor in the United States or Territories or the District of Columbia.

2. Preference will be given to articles or materials of domestic production, conditions of quality and price being equal, including in the price of foreign articles the duty thereon.

3. No proposal will be considered unless accompanied by a guaranty, which should be in manner and form as directed in these instructions.

4. All bids and guaranties must be made in triplicate, upon printed forms to be obtained at this office.

5. The guaranty attached to each copy of the bid must be signed by an authorized surety company, or by two responsible guarantors, to be certified as good and sufficient guarantors by a Judge or clerk of a United States Court, United States District Attorney, United States Commissioner, or Judge or clerk of a State court of record, with the seal of said court attached.

6. A firm as such will not be accepted as surety, nor a part-
43 ner for a copartner or firm of which he is a member. Stockholders who are not officers of a corporation may be accepted as sureties for such corporation. Sureties, if individuals, must be citizens of the United States.

7. When the principal, a guarantor, or a surety is an individual, his signature to a guaranty or bond shall have affixed to it an adhesive seal. Corporate seals will be affixed by corporations, whether principals or sureties. All signatures to proposals, guaranties, contracts, and bonds should be written out in full, and each signature to guaranties, contracts, and bonds should be attested by at least one witness, and, when practicable, by a separate witness to each signature.

8. Each guarantor will justify in a sum of ten thousand dollars ($10,000.00). The liability of the guarantors and bidder is determined by the Act of March 3, 1883, 22 Statutes, 487, Chap. 120, and is expressed in the guaranty attached to the bid.

9. A proposal by a person who affixes to his signature the word "president," "secretary," "agent," or other designation, without disclosing his principal, is the proposal of the individual. That by a corporation should be signed with the name of the corporation, followed by the signature of the president, secretary, or other person authorized to bind it in the matter, who should file evidence of his authority to do so. That by a firm should be signed with the firm name, either by a member thereof or by its agent, giving the names of all members of the firm. Anyone signing the proposal as the agent of another or others must file with it legal evidence of his authority to do so.

10. The place of residence of every bidder and post-office address, with county and State, must be given after his signature.

11. All prices must be written as well as expressed in figures.

44 12. One copy each of the advertisement, the instructions for bidders, and the specifications, all of which can be obtained at this office on application by mail or in person, must be securely attached to each copy of the proposal and be considered as comprising a part of it.

13. Proposals must be prepared without assistance from any person employed in or belonging to the military service of the United States or employed under this office.

14. No bidder will be informed, directly or indirectly, of the name of any person intending to bid or not to bid, or to whom information in respect to proposals may have been given.

15. All blank spaces in the proposal and bond must be filled in, and no change shall be made in the phraseology of the proposal, or

addition to the items mentioned therein. Any conditions, limitations, or provisos attached to proposals will be liable to render them informal and cause their rejection.

16. Alterations by erasure or interlineation must be explained or noted in the proposal over the signature of the bidder.

17. If a bidder wishes to withdraw his proposal he may do so before the time fixed for the opening, without prejudice to himself, by communicating his purpose in writing to the officer who holds it, and when reached, it shall be handed to him or his authorized agent, unread.

18. No bids received after the time set for opening of proposals will be considered.

19. The proposals and guaranties must be placed in a sealed envelope marked "Proposals for lock and dam No. 6, to be opened May 28, 1906," and inclosed in another sealed envelope addressed to Captain W. P. Wooten, Corps of Engineers, but otherwise unmarked. It is suggested that the inner envelope be sealed with sealing wax.

20. It is understood and agreed that the guaranties given are approximately only, and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders, or their authorized agents, are expected to examine the maps and drawings in this office, which are open to their inspection, to visit the locality of the work, and to make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies.

21. The United States reserves the right to reject any and all bids and to waive any informality in the bids received; also to disregard the bid of any failing bidder or contractor known as such to the Engineer Department, or any bid which is palpably unbalanced or obviously below what the work can be done for, or the bid of any bidder who shall fail to produce, when called upon to do so, evidence satisfactory to the Engineer Officer in charge of the said bidder's ability to do the contemplated work within the required time, including his control of the necessary means and equipment. The failure of a bidder to make satisfactory progress or to complete on time similar work under previous contracts with the United States will be duly considered in canvassing bids and may be a valid cause for the rejection of his proposal. Reasonable grounds for supposing that any bidder is interested in more than one bid for the same item will cause the rejection of all bids in which he is interested.

22. The bidder to whom award is made will be required to enter into written contract with the United States, with good and approved security, in an amount of not less than twenty-five per cent. of the amount of the contract, within ten (10) days after being notified of the acceptance of his proposal. The contract which the bidder and guarantors promise to enter into shall be, in its general provisions, in the form adopted and in general use by the Engineer Department of the Army, blank forms of which can be inspected at this office, and will be furnished, if desired, to parties proposin gto put in bids. Parties making bids are to be understood as

accepting the terms and conditions contained in such form of contract.

23. The sureties, if individuals, are to make and subscribe affidavits of justification on the back of the bond to the contract, and they must justify in amounts which shall aggregate double the amount of the penal sum named in the bond.

24. Bidders are invited to be present at the opening of the bids.

## General Conditions.

25. A copy of the advertisement, and of the specifications, instructions, and conditions will be attached to the contract and form a part of it.

26. The contractor should, within ten days from the award of the contract, furnish the office with the post-office address to which communications should be sent.

27. Transfers of contracts, or of interest in contracts, are prohibited by law.

28. The contractor will not be allowed to take advantage of any error or omission in these specifications, as full instructions will always be given should such error or omission be discovered.

29. The decision of the Engineer Officer in charge as to quality and quantity shall be final.

30. Payments will be made monthly, except when otherwise herein specified, on estimates of results accomplished during the preceding month. A percentage of ten (10) per centum will be reserved
47 from each payment until the completion of the contract. Except where otherwise herein specified, all payments will be made on the basis of actual net quantities as measured and accepted in final place. (See Par. 35.)

31. The contractor will be required to commence work under the contract within sixty days after the date of notification of approval of the contract by the Chief of Engineers, U. S. Army, to prosecute the said work with faithfulness and energy, and to complete it not later than September 1, 1908. (See Par. 35.)

32. Unless extraordinary and unforeseeable conditions supervene, the time allowed in these specifications for the completion of the contract to be entered, into is considered sufficient for such completion by a contractor having the necessary plant, capital, and experience. If the work is not completed within the period stipulated in the contract, the Engineer Officer in charge may, with the prior sanction of the Chief of Engineers, waive the time limit and permit the contractor to finish the work within a reasonable period, to be determined by the said Engineer Officer in charge. Should the original time limit be thus waived, all expenses for inspection and superintendence and other actual loss and damages to the United States due to the delay beyond the time originally set for completion shall be determined by the said Engineer Officer in charge and deducted from any payments due or to become due to the contractor: Provided, however, that the party of the first part may, with the prior sanction of the Chief of Engineers, waive for a reasonable period the time limit originally set for completion and remit the charges for expenses of superintendence and inspection for so much time as in the

judgment of the said Engineer Officer in charge may actually have been lost on account of unusual freshets, ice, rainfall, or other
48 abnormal force or violence of the elements, or by epidemics, local or state quarantine restrictions, or other unforeseeable cause of delay arising through no fault of the contractor, and which prevented him from commencing or completing the work or delivering the materials within the period required by the contract: Provided, further, that nothing in these specifications shall affect the power of the party of the first part to annul the contract as provided in the form of contract adopted and in use by the Engineer Department of the Army; Provided, further, that if — any time it is apparent that the contractor cannot complete the work in the specified time, or shall refuse or fail to prosecute the work vigorously, or to provide for carrying on the same as directed, the United States reserves the right to enter upon the work, purchase such material and supply such labor at the expense of the contractor as may be necessary to put the work in a proper state of advancement. Provided, further, that if the contractor fails in any one month to do four per cent. of the work, as derived from the statement of approximate quantities forming part of the specifications, such failure may be taken as a sufficient cause for the annulment of this contract, or for other action under the provisions of these specifications unless such failure is caused by freshets, or other unforeseeable causes of delay as set forth above.

33. Annulment.—In case of the annulment of this contract as conditionally provided for in the form of contract adopted and in use by the Engineer Department of the Army, the United States shall have the right to take possession of, wherever they may be, and to retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of same prepared for use or in use in the prosecution of the work, together with any or all leases, rights of way or quarry
49 privileges, under purchase, at a valuation to be determined by the Engineer Officer in charge.

34. The contractor will be required to hold the United States harmless against all claims for the use of any patented article, process, or appliance in connection with the contract herein contemplated.

35. Work Proposed.—The work proposed under these specifications is to be done under the provisions of Act of Congress approved March 3, 1905, which contemplates the construction of locks and dams on the Trinity River, Texas. It includes the construction of lock and dam No. 6, with abutment, crib work, bank protection, and the providing and setting of trestles, lock-gates, and all other parts necessary to complete and put the structures in proper operation, all in accordance with the drawings and these specifications.

There is now available for this work, including office expenses and superintendence, about $105,000. It is believed that, in accordance with the provisions of the above-mentioned act, Congress will at its present session appropriate additional funds sufficient to complete the work covered by these specifications, but there is no guaranty of this and the contractor must assume all risk of exhaustion of funds. Each bidder will be required to state in his proposal whether he will agree to prosecute the work continuously, so as to complete it within the time named in paragraph 31, or whether he will suspend work in

case the funds available for payments to the contractor become exhausted.

In making award the right is reserved to select the alternative deemed most advantageous to the United States.

If the first method is adopted, the United States will make
50 payments immediately after funds have become available if all the conditions of these specifications have been fulfilled.

If the second method is adopted, the date of suspension will be fixed by the Engineer Officer in charge and the contractor will be required to resume work within 30 days after notification that funds are again available for payments.

If the work is suspended for lack of funds, additional time for completion will be allowed equivalent to the time during which the work is so suspended.

36. Site.—The site for lock No. 6 is about forty-two miles below Dallas by river, and about eight miles by road from switch on the T. M. R. R.

All this section of the river has been cleared of snags, but the stages of water are usually low and navigation is uncertain.

37. Physical Characteristics.—The surrounding country is heavily timbered. Open-air work can be carried on nearly all the year, and although ice sometimes forms during the winter, the cold is rarely severe enough to prevent such work as the laying of concrete. Rises in the river are liable to occur at any time, but come chiefly during the Spring months, and severe floods, which are of occasional occurrence, spread over the bottoms. Usually the river does not overflow its banks.

38. Drawings and Specifications.—The location, dimensions, and general construction shall be as shown on the drawings exhibited. Additional drawings will be furnished as needed. All drawings exhibited and furnished to illustrate the work shall form part of these specifications. Any error, discrepancy or point not clearly understood either in drawings or specifications shall be referred for decision to the Engineer Officer in charge, and shall not be made a ground for claim against the United States.

51 39. Supervision.—The work shall be conducted in strict accordance with the instructions of the Engineer Officer in charge. Any work done in disobedience to his instructions will not be paid for. The order of the work shall be subject to his approval. The contractor shall personally superintend the work during its progress or have it personally superintended by a competent and responsible representative duly accredited as such to this office. Any incompetent, insubordinate, disorderly, or objectionable employee of the contractor shall be dismissed from the work if required by the Engineer Officer in charge and not be re-employed. Such discharge shall not form the basis of any claim for compensation or damage upon the United States or any of its agents.

40. Inspection.—The United States will employ one or more inspectors on the work. The contractor, without additional compensation, shall, when required, furnish every facility for such inspectors and for the Engineer Officer in charge and his agent to supervise and inspect all work and materials, and to send and receive official mail. All transportation necessary for these purposes shall be promptly fur-

nished by the contractor without expense to the United States. Whenever the contractor furnishes board and lodging to his own employees, he shall also, if required, furnish suitable board and lodging to such employees of the United States as are connected with the work, at not to exceed fifteen dollars per month for each employee, to be paid for by the United States with the monthly payments.

41. Injury to Work.—The United States will not be responsible for the safety of the contractor's employees, plant or materials, nor for any damage done by or to them from any source or cause, and damages caused by the contractor or his employees to any portion of the Government work shall at once be properly repaired
52 by the contractor, at his own expense. If the contractor does not at once repair such damages the United States may repair the same, and the entire cost of doing so will be deducted from the monthly payments due or to become due the contractor. Any injury to work or loss of material, whether in cofferdams, concrete, or any other part of the construction, which may occur before the completion of the contract, from natural causes and without fault or negligence or delay on the part of the contractor, will be repaired or restored by the contractor at contract prices at the expense of the United States, and shall be paid for when possible under the unit prices of this contract, and when not so possible shall be paid for as specified in the clause "Extras and Changes." When the injury or loss, or where injury, loss or disfigurement of any kind is due to fault, negligence or delay on the contractor's part, the damage shall be made good by him to the satisfaction of the Engineer Officer, at contractor's expense. All the work contracted for must be placed in final working order to the satisfaction of the Engineer Officer in charge, before final payment is made. Acceptance or approval of, or payment for, any part of the work shall not release the contractor from the obligation to guard and to keep that part in good order and condition, and to repair at his own expense any defects that may develop in it, when such defects are due to faulty material or workmanship supplied by him, until the completion and final acceptance of the work as a whole.

42. Use of U. S. Grounds.—The contractors, during the progress of the work, will have the privilege of using such portions of the Government land on both sides of the river at the site, for storage purposes, temporary buildings, etc., as are not otherwise used or reserved by the United States. It is understood, however, that
53 the contractor shall, at any time during the progress of the work, promptly vacate and clean up any part of the Government land that may have been allotted to him, or be in use by him, whenever it is needed by the United States.

43. Time of Work.—Work shall generally be done between sunrise and sunset. Work at night, on Sundays, or on national holidays will not be permitted, except by authority of the Engineer Officer in charge. Should necessity arise for carrying on work at night, on Sundays, or national holidays, this shall be done by the contractor to the extent directed by the Engineer Officer in charge.

44. Stakes and Templates.—The lines and levels for the work having been given on the ground by the Engineer Officer in charge, the contractor must conform and keep thereto, and all stakes and

benches, after being placed, must be kept in position by the contractor without cost to the United States. The contractor shall furnish, at his own expense, the stakes required to lay out the work, as well as the labor required to place them or to remove them to other positions when so directed. He will also be required to furnish, without cost to the United States, all templates, and platforms, on the ground or elevated, that may be required at any time in building or laying out any part of the work.

45. Furnishing Labor.—The contractor shall furnish, upon request of the Engineer Officer in charge, any labor needed to do occasional work, skilled or unskilled, which may be needed by the United States, in connection with this work. For skilled labor so supplied, the contractor shall receive thirty cents per hour per man, and for unskilled labor fifteen cents per hour per man. Any labor or material (other than surveying instruments and special apparatus) required from time to time to aid the employees of the United States in inspecting, in making surveys, or in other
54 matters connected with the work, shall be furnished by the contractor at cost price and will be paid for by the United States with the monthly payments, except where the contractor is herein specifically requested to furnish such services, materials, etc., at his own expense. Where the cost of extra work or material can, in the opinion of the Engineer Officer in charge, be paid for on the basis of the unit price of the contract, these unit prices shall be used.

46. Complete Work.—The contractor is not to take advantage of any omission of details in drawings or specifications, or errors in either, but he will be required to do everything which may be necessary to carry out in good faith the contract, which contemplates everything complete, in good working order, of good material, with accurate workmanship, skillfully fitted and properly connected and put together. He must supply all materials and labor, all bolts, machinery, supplies, tools, cement and other sheds, quarters and such other plant, parts or structures as may be needed temporarily or permanently in order to complete the work according to the true intent of the contract.

47. Extras and Changes.—If it should become necessary to do any work or make purchases not covered by the unit prices of this contract, the contractor shall furnish the same at the current rates existing at the time of said purchase or work; said current rates to be determined by the Engineer Officer in charge, and approved by the Chief of Engineers, and payment therefor to be made with the monthly payments. In all other cases where material changes from the specifications are deemed necessary, or for the interest of the Government by the Engineer Officer in charge, such changes, including the price for same, shall be agreed upon by the contracting parties beforehand in writing, and approved by the Secretary of
55 War. But minor changes that involve no material increase in cost shall be made by the contractor, without additional compensation, whenever directed by the Engineer Officer in charge.

48. Rubbish to be Removed.—Within thirty days after the completion of the work, and before final payment is made, the contractor shall remove from the site all rubbish, old or unused materials, etc., and shall fill up any excavation made for his convenience, as the

Engineer Officer in charge may direct, and shall leave the whole in good order and satisfactory condition without expense to the United States.

Form 19*a*.

1. This agreement entered into this Tenth day of July, nineteen hundred and six between Captain W. P. Wooten, Corps of Engineers, United States Army, of the first part, and Hubbard Building & Realty Co. of Dallas in the county of Dallas, State of Texas, of the second part, Witnesseth, that in conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said Captain W. P. Wooten, Corps of Engineers, U. S. Army, for and in behalf of the United States of America, and the said Hubbard Building & Realty Co., do covenant and agree, to and with each other, as follows:

The said party of the second part agrees to construct Lock and Dam No. 6 in Section One of the Trinity River, Texas, in accordance with the plans and specifications hereunto attached, which form a part of this contract, and under the second method, as outlined in paragraph 35 of the specifications, at the unit prices given below, viz.:

| | | |
|---|---|---|
| | Grubbing and clearing at One hundred dollars per acre | ($100.00) |
| | Excavation at Forty cents per cubic yard | ($ .40) |
| 56 | Round timber at Thirty cents per lineal foot | ($ .30) |
| | Round piles at Fifty cents per lineal foot | ($ .50) |
| | Brush at Ten dollars per cord | ($ 10.00) |
| | Concrete at Seven dollars and fifty cents per cubic yard | ($ 7.50) |
| | Boule gates at Fifty dollars per M feet board measure | ($ 50.00) |
| | Oak timber at Five cents per foot board measure | ($ .05) |
| | Timber in permanent work at Fifty dollars per M feet B. M. | ($ 50.00) |
| | Timber in cribs at Fifty dollars per M feet board measure | ($ 50.00) |
| | Riprap at Five dollars per cubic yard | ($ 5.00) |
| | Iron and steel at Six and one-half cents per pound | ($ .06½) |
| | Steel re-inforcing rods at Seven cents per pound | ($ .07) |
| | Chain at Seven and one-half cents per pound | ($ .07½) |
| | Drift bolts at Five cents per pound | ($ .05) |
| | Sheet piling at Fifty dollars per M feet board measure | ($ 50.00) |
| | Sheet piling, steel at Seventy-five cents per square foot | ($ .75) |
| | Plain filling at Thirty cents per cubic yard | ($ .30) |
| | Compacted filling at Forty cents per cubic yard | ($ .40) |
| | Riprap paving at Forty cents per square foot | ($ .40) |
| | Paving on spalls at Fifty cents per square foot | ($ .50) |
| | Paving in concrete at Fifty cents per square foot | ($ .50) |
| 57 | Paving for cribs at Twenty cents per square foot | ($ .20) |
| | Sand bags at Ten cents each | ($ .10) |
| | Gauges at Fifty cents per lineal foot | ($ .50) |
| | Crab, crane and service car at Twenty-five cents per pound | ($ .25) |
| | Frames with rollers at Two dollars each | ($ 2.00) |
| | Drains under lock floor at Fifty cents per lineal foot | ($ .50) |

2. All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as do not conform to the specifications set forth in this contract shall be rejected. The decision of the engineer officer in charge as to quality and quantity shall be final.

3. The said party of the second part shall commence, prosecute, and complete the work herein contracted for as set forth in paragraph 31 & 35 of the attached specifications.

4. If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, and upon the giving of such notice all payments to the party or parties of the second part under this contract shall cease, and all money or reserved percentage due or to become
58 due the said party or parties of the second part, by reason of this contract, shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by the said United States, in excess of those payable by the said United States during the period herein allowed for the completion of the contract by the party of the second part; and the party of the first part may deduct all the above-mentioned sums out of or from the money or reserved percentage retained as aforesaid; and upon the giving of the said notice the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the material, by contract or otherwise in accordance with law.

5. It is further agreed that if the party of the second part shall fail to prosecute the work covered by this contract so as to complete the same within the time agreed upon, the party of the first part may, with the prior sanction of the Chief of Engineers, in lieu of annulling the contract under the preceding paragraph, waive the time limit and permit the party of the second part to finish the work within a reasonable period, to be determined by the said party of the first part. Should the original time limit be thus waived, all expenses for inspection and superintendence, and all other actual losses and damages to the United States due to the delay beyond the time originally set for completion shall be determined by the said party of the first
59 part and deducted from any payments due or to become due the party of the second part; Provided, however, that the party of the first part may, with the prior sanction of the Chief of

Engineers, remit the charges for expenses of inspection and superintendence for so much time as in the judgment of the said party of the first part may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by epidemics, local or State quarantine restrictions, or other unforeseeable cause of delay arising through no fault of the party of the second part, and which actually prevented him (or them) from commencing or completing the work or delivering the materials within the period required by the contract, but such waiver of the time and remission of charges shall in no other manner affect the rights or obligations of the parties under this contract.

6. If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War; Provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

7. No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

8. The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

9. It is further agreed by and between the parties hereto that until final inspection and acceptance of, and payment for, all of the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the party of the first part to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

10. The party of the second part further agrees to hold and save the United States harmless from and against all and every demand, or demands, of any nature or kind for, or on account of, the use of any patented invention, article, or process included in the materials hereby agreed to be furnished and work to be done under this contract.

11. Payments shall be made to the party of the second part as prescribed in paragraph 30 of the specifications hereto attached and forming part of this agreement.

12. Neither this contract nor any interest therein shall be trans-

ferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferrer or the transferee, but all rights of action for any
61 breach of this contract by said Hubbard Building & Realty Co. are reserved to the United States.

13. No Member of or Delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom.

But this stipulation, so far as it relates to Members of or Delegates to Congress, is not to be construed to extend to this contract.

14. This contract shall be subject to approval of the Chief of Engineers, U. S. A.

In witness whereof the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

Witnesses:

EDWARD CULVER, as to

W. P. WOOTEN,
*Captain, Corps of Engineers, U. S. A.*

A. F. SLATER, as to

HUBBARD BUILDING & REALTY CO.,
As to per J. A. HUBBARD,
*President.*

(Executed in triplicate.)

A. MACKENZIE,
*Brig. Gen., Chief of Engineers, U. S. Army.*

Approved, July 28, 1906.

62 War Department,

United States Engineer Office,

Federal Building,

Dallas, Texas.

"DEFENDANT'S EXHIBIT 17."

Sten. M. W. C. Mar. 10, 1913.

OCTOBER 22, 1909.

Hubbard Building & Realty Company, Mr. George A. Carden, President, Dallas, Texas.

GENTLEMEN: In that the Hubbard Building & Realty Company, contractor for the construction of lock and dam No. 6 on the Trinity River, Texas, has not performed any work of actual construction since September 9, 1909, and has shown no indication, either by written notice, or otherwise, that it intends to prosecute the work to the finish, and this after divers extensions in time had been granted the said Hubbard Building & Realty Company for its convenience:

And in that paragraph 4 of contract entered into the 10th day of July, 1906 by and Between Captain W. P. Wooten, Corps of Engineers, U. S. Army, party of the first part, and Hubbard Building & Realty Company, party of the second part, which contract was approved by Brigadier General A. Mackenzie, Chief of Engineers, July 28, 1906, reads in part: "If, in any event, the party of the second part * * * shall in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then * * * the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the
63 party (or parties, or either of them) of the second part, and upon the giving of such notice all payments to the party or parties of the second part under this contract shall cease * * * *."

Therefore, with the prior sanction of the Chief of Engineers, I do hereby annul the above-mentioned contract, and no further payments under said contract will be made by this office.

Very respectfully,

A. E. WALDRON,
*Captain Corps of Engineers.*

A. E. W./b.

"DEFENDANT'S EXHIBIT 20."

J. G. White & Company, Incorporated,

Engineers Contractors,

43-49 Exchange Place, New York, N. Y.

Correspondents:

J. G. White & Company, Limited, 9 Cloak Lane, London E. C.
Waring & White (1906) Limited 1 A Cockspur St., London, England.

Cable Address:

Whitemoth, New York.

Codes Used:

Liebers A. B. C. 4th Ed'n.
Bedford McNeil A. 1.
Western Union.

NEW YORK, May 18, 1910.

Capt. A. E. Waldron, Corps U. S. Engineers, Federal Bldg., Dallas, Texas.

DEAR SIR: Re Trinity River.

We hand you herewith contract dated May 18, 1910, in triplicate, executed by us, for the completion of Lock and Dam No. 6, Trinity River, Texas, and Contractor's Bond, in triplicate, fully executed.

When you return our fully executed copy of this contract
64 will you kindly send us six copies of the Advertisement and printed Specifications in the form originally dated April 12, 1906, seven copies of form No. 19 Articles of Agreement, and seven copies of Form J Contractor's Bond. These printed Specifications and forms are reqired by us to make up for our files and for distribution to various of our departments interested copies of the agreement, etc.

As we are desirous of starting construction work promptly, we would ask that upon request of either our construction superintendent, Mr. F. W. Ward, or our construction manager, Mr. E. G. Williams, who will visit you and the site of the work shortly, en route from California to the East, under the provisions of insert E, to follow paragraph 38, and of paragraph 33 of the specifications, you take possession of any of the materials, tools, buildings, tramways, cars, etc., prepared for use or in use in the prosecution of the work by the Hubbard Building & Realty Company, and any of the leases, rights of way or quarry privileges in the possession of said Hubbard Building & Realty Company at the time of annulment of their contract, and turn over to us for our use in carrying out our agreement with the United States any such materials, tools, buildings, tramways, cars, etc., and leases, rights of way or quarry privileges, of which you may take possession. It is the intention of this request that our construction superintendent or our construction manager shall select such of the materials, tools, etc., as may be required and request you to take possession accordingly of only what is required and will be of service to us in carrying out our contract.

Yours very truly,

J. G. WHITE & COMPANY, INC.,
WM. McM. NORTH,
*Construction Department.*

G. W. B./J. F. B.

Encs.

65 *Advertisement.*

"DEFENDANT'S EXHIBIT 21."

Sten. M. W. C., Mar. 10, 1913.

United States Engineer Office,

Federal Building,

DALLAS, TEXAS, April 30, 1910.

Sealed proposals for completing lock and dam No. 6 on Trinity River, Texas, will be received here until 12 M., May 10, 1910, and then publicly opened. Information furnished on application.

A. E. WALDRON,
*Capt. Eng'rs.*

work under previous contracts with the United States will be duly considered in canvassing bids and may be a valid cause for the rejection of his proposal. Reasonable grounds for supposing that any bidder is interested in more than one bid for the same item will cause the rejection of all bids in which he is interested.

69 22. The bidder to whom award is made will be required to enter into written contract with the United States, with good and approved security, in an amount of not less than twenty-five per cent. of the amount of the contract, within ten (10) days after being notified of the acceptance of his proposal. The contract which the bidder and guarantors promise to enter into shall be, in its general provisions, in the form adopted and in general use by the Engineer Department of the Army, blank forms of which can be inspected at this office, and will be furnished, if desired, to parties proposing to put in bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of contract.

23. The sureties, if individuals, are to make and subscribe affidavits of justification on the back of the bond to the contract, and they must justify in amounts which shall aggregate double the amount of the penal sum name in the bond.

24. Bidders are invited to be present at the opening of the bids.

General Conditions.

25. A copy of the advertisement, and of the specifications, instructions, and conditions will be attached to the contract and form a part of it.

26. The contractor should, within ten days from the award of the contract, furnish the office with the post-office address to which communications should be sent.

27. Transfers of contracts, or of interest in contracts, are prohibited by law.

28. The contractor will not be allowed to take advantage of any error or omission in these specifications, as full instructions will always be given should such error or omission be discovered.

70 29. The decision of the Engineer Officer in charge as to quality and quantity shall be final

30. Payments will be made monthly, except when otherwise herein specified, on estimates of results accomplished during the preceding month. A percentage of ten (10) per centum will be reserved from each payment until the completion of the contract. Except where otherwise herein specified, all payments will be made on the basis of actual net quantities as measured and accepted in final place. (See Par. 35.)

31. The contractor will be required to commence work under the contract within sixty days after the date of notification of approval of the contract by the Chief of Engineers, U. S. Army, to prosecute the said work with faithfulness and energy, and to complete it not later than June 1, 1911. (See Par. 35.)

32. Unless extraordinary and unforeseeable conditions supervene, the time allowed in these specifications for the completion of the contract to be entered into is considered sufficient for such completion

by a contractor having the necessary plant, capital, and experience. If the work is not completed within the period stipulated in the contract, the Engineer Officer in charge may, with the prior sanction of the Chief of Engineers, waive the time limit and permit the contractor to finish the work within a reasonable period, to be determined by the said Engineer Officer in charge Should the original time limit be thus waived, all expenses for inspection and superintendence and other actual loss and damages to the United States due to the delay beyond the time originally set for completion shall be determined by the said Engineer Officer in charge and deducted from any payments due or to become due to the contractor: Provided, however, that the party of the first part may, with the prior sanction of the Chief of Engineers, waive for a reasonable period the time
71 limit originally set for completion and remit the charges for expenses of superintendence and inspection for so much time as in the judgment of the said Engineer Officer in charge may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by epidemics, local or State quarantine restrictions, or other unforeseeable cause of delay arising through no fault of the contractor, and which prevented him from commencing or completing the work or delivering the materials within the period required by the contract: Provided, further, that nothing in these specifications shall affect the power of the party of the first part to annul the contract as provided in the form of contract adopted and in use by the Engineer Department of the Army: Provided, further, that if — any time it is apparent that the contractor cannot complete the work in the specified time, or shall refuse or fail to prosecute the work vigorously, or to provide for carrying on the same as directed, the United States reserves the right to enter upon the work, purchase such material and supply such labor at the expense of the contractor as may be necessary to put the work in a proper state of advancement. Provided, further, that if the contractor fails in any one month to do four per cent. of the work, as derived from the statement of approximate quantities forming part of the specifications, such failure may be taken as a sufficient cause for the annulment of this contract, or for other action under the provisions of these specifications unless such failure is caused by freshets, or other unforeseeable causes of delay as set forth above.

33. Annulment.—In case of the annulment of this contract as conditionally provided for in the form of contract adopted and in use by the Engineer Department of the Army, the United States shall have the right to take possession of, wherever they may be,
72 and to retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of same prepared for use or in use in the prosecution of the work, together with any or all leases, rights of way or quarry privileges, under purchase, at a valuation to be determined by the Engineer Officer in charge.

34. The contractor will be required to hold the United States harmless against all claims for the use of any patented article, process, or appliance in connection with the contract herein contemplated.

35. Work Proposed.—The work proposed under these specifica-

tions is to be done under the provisions of Act of Congress approved March 3, 1905, which contemplates the construction of locks and dams on the Trinity River, Texas. It includes the completion of lock and dam No. 6, with abutment, crib, work, bank protection, and the providing and setting of trestles, lock-gates, and all other parts necessary to complete and put the structures in proper operation, all in accordance with the drawings and these specifications.

The construction of the lock and dam was begun under contract dated July 10, 1906, with the Hubbard Building & Realty Company and was prosecuted under this contract and agreements supplementary thereto until September, 1909, when the contractor abandoned the work then approximately half completed. The contract with the Hubbard Building & Realty Company was annulled October 22, 1909, and it is the intent of these specifications, and of the contract to be entered into thereunder, to provide for the completion of the work undertaken by the Hubbard Building & Realty Company without change or modification of any kind that could not have been made under the original contract with that company, and no provision or provisions herein shall be construed to nullify such intention.

73 Present Condition of the Work.—Both the land and river walls are completed with the exception of placing the gate anchors; the ladders on the river wall are yet to be placed in the recesses provided for them; the capstans and snubbing posts are in place; about one thousand cubic yards of earth will have to be excavated before the construction of the lock floor can be commenced; the upper and lower land cribs are filled with riprap and stones cut for paving the same; the crib below the abutment is completed except the paving; the line of protection piles below the crib abutment has been placed; and 173 cubic yards of concrete have been placed in the abutment proper. About 250 piles have been driven of those required under the lock floor and dam.

36. Site.—The site for lock No. 6 is about forty-two miles below Dallas by river, and about eight miles by road from switch on the T. M. R. R.

All this section of the river has been cleared of snags, but the stages of water are usually low and navigation is uncertain.

37. Physical Characteristics.—The surrounding country is heavily timbered. Open-air work can be carried on nearly all the year, and although ice sometimes forms during the winter, the cold is rarely severe enough to prevent such work as the laying of concrete. Rises in the river are liable to occur at any time, but come chiefly during the spring months, and severe floods, which are of occasional occurrence, spread over the bottoms. Usually the river does not overflow its banks.

38. Drawings and Specifications.—The location, dimensions, and general construction shall be as shown on the drawings exhibited. Additional drawings will be furnished as needed. All drawings exhibited and furnished to illustrate the work shall form part

74 of these specifications. Any error, descrepancy or point not clearly understood either in drawings or specifications shall be referred for decision to the Engineer Officer in charge, and shall not be made a ground for claim against the United States.

(*a*) The drawings referred to in paragraph 38 are listed and described as follows:

| Sheet. | Index No. | Title. |
|---|---|---|
| 1 | Y2/70 | Survey of Site of Lock No. 6. |
| 2 | Y2/71 | General Plan and Elevations of Lock and Cribs. |
| 3 | Y2/72 | Foundation Plan, Sections and Elevations. |
| 4 | Y2/74 | Sections and Elevations of Lock Walls and Crib. |
| 5 | Y2/75 | General Plan, Pile Plan and Sections of Dam. |
| 6 | Y2/77 | Plan Elevations and Sections of Abutment. |
| 7 | Y2/76 | General Plans, Elevations and Sections of Dam, Pier Drift Chute and Abutment. |
| 8 | Y2/79 | Details of Trestle for Dam. |
| 9 | Y2/78 | Details of Boulé Gates and Fittings for Dam. |
| 10 | Y1/17 | Details of Crab for Dams Nos. 1 and 6. |
| 11 | Y1/21 | Crane and Service Car for Dams Nos. 1 and 6. |
| 12 | Y1/12 | General Drawings of Lock Gates, Locks Nos. 1 and 6. |
| 13 | Y1/13 | Fittings for Lock Gates, Locks Nos. 1 and 6. |
| 14 | Y1/14 | Details of Valves, Fittings and Railings of Gates, Locks Nos. 1 and 6. |
| 75 | | |
| 15 | Y1/15 | Fittings for Locks and Gates, Locks Nos. 1 and 6. |
| 16 | Y2/73 | Location of Capstans and Gate Anchorage (Lock No. 6). |
| 17 | Y1/18 | Details of Iron Work for River Wall, Drift Chute and Abutment Locks Nos. 1 and 6. |
| 18 | Y1/19 | Details of Capstans and Coffer Beam-Casting, Locks Nos. 1 and 6. |
| 19 | Y1/20 | Details of Coffer Beam for Locks. |

(*b*) There is at the lock site approximately the following invoice of plant and material left at the site of the work by the defaulting contractor, the Hubbard Building & Realty Company:

| Article. | Designation. | Total on hand. | Serviceable. | Unserviceable. |
|---|---|---|---|---|
| Anvils | No. | 2 | 1 | 1 |
| Boilers, 40 h. p. with fittings | " | 2 | 2 | .. |
| Buckets, orange peel | " | 1 | 1 | .. |
| Buckets, concrete, 1 yd | " | 2 | 2 | .. |
| Blocks, assorted | " | 8 | 8 | .. |
| Bowls, sugar | " | 2 | 2 | .. |
| Cars, western dump, 1½ yd | " | 10 | 10 | .. |
| Cars, Arthur Kopple Co., 1 yd., all iron | " | 15 | 10 | 5 |
| Concrete mixer, Smith's make, 1 yd. | " | 1 | 1 | .. |
| Cleavers | " | 2 | 2 | .. |
| Cups | " | 27 | 27 | .. |

| Article. | Designation. | Total on hand. | Serviceable. | Unserviceable. |
|---|---|---|---|---|
| Derricks, cottonwood mast and boom with rigging, i. e., guy ropes, etc. | " | 3 | 3 | .. |
| Derricks, 90 ft. steel mast, 75 ft. steel boom, with rigging complete | " | 1 | .. | .. |
| Drill press | " | 1 | 1 | .. |
| 76 | | | | |
| Desk, writing, 3 x 6 ft., 3 drawers | No. | 1 | 1 | .. |
| Engines, hoisting, 3 drum | " | 3 | 3 | .. |
| Engines, hoisting, 2 drum | " | 3 | 3 | .. |
| Engines, traction | " | 1 | .. | 1 |
| Forge | " | 1 | 1 | .. |
| Forks, table | " | 37 | 37 | .. |
| Grindstone | " | 1 | 1 | .. |
| Hammers, steam | " | 1 | .. | 1 |
| Hoes | " | 2 | 2 | .. |
| Jack Screw | " | 1 | 1 | .. |
| Knives, table | " | 36 | 36 | .. |
| Knives, butcher | " | 2 | 2 | .. |
| Ladles, Soup | " | 5 | 5 | .. |
| Pumps, Smith-Vale, 2" discharge | " | 1 | 1 | .. |
| Pumps, Smith-Vale, 3" discharge | " | 1 | .. | 1 |
| Pumps, 1½" discharge | No. | 1 | 1 | .. |
| Pans, wash | " | 1 | 1 | .. |
| Pans, bread | " | 6 | 6 | .. |
| Pans, assorted | " | 42 | 42 | .. |
| Pans, dish | " | 2 | 2 | .. |
| Pots, coffee | " | 4 | 4 | .. |
| Pots, stew | " | 3 | 3 | .. |
| Plates, assorted | " | 38 | 38 | .. |
| Pitchers, small size | " | 6 | 6 | .. |
| Picks, 45 without handles | " | 63 | 63 | .. |
| Planer, small size | " | 1 | 1 | .. |
| Pipe, steam line, 3 in | Ft. | 600 | 600 | .. |
| Pipe, steam and water, 2" | " | 294 | 294 | .. |
| Ranges, 6 hole | No. | 2 | 2 | .. |
| Rope, manila | Lbs. | 300 | .. | 300 |
| Saw mill, mangle and carriage | No. | 1 | .. | 1 |
| Spoons, table | " | 44 | 44 | .. |
| Spoons, tea | " | 24 | 24 | .. |
| Skillets | " | 2 | 2 | .. |
| Saw, meat | " | 1 | 1 | .. |
| Saucers | " | 12 | 12 | .. |

77

| Article. | Designation. | Total on hand. | Serviceable. | Unserviceable. |
|---|---|---|---|---|
| Sieve | No. | 1 | 1 | .. |
| Shovels | " | 10 | 10 | .. |
| Spades | " | 17 | 17 | .. |
| Spike maul | " | 1 | 1 | .. |
| Vise | " | 1 | 1 | .. |
| Water tank, cypress, cap. 600 gal. (about) | " | 1 | 1 | .. |

Quarter Facilities.

| | |
|---|---|
| 1 cement shed | 25 x 52 |
| 1 blacksmith shop | 18 x 25 |
| 1 material house | 14 x 30 |
| 1 bunk house | 20 x 30 |
| (This house 2 story.) | |
| Dining room or mess hall | 15 x 48 |
| Kitchen and commissary | 15 x 48 |
| Office building | 16 x 20 |
| Bunk house | 18 x 26 |
| Bunk house | 30 x 30 |
| Bunk house | 17 x 30 |

Some 4 or 5 tents, cots and bedding which are hard to classify, as they could be used in some weather, but would be of little use in cold weather.

All of the above named houses are what is known as "Box" houses, some covered with shingles and some with tar paper, except the dining-room, which is walled up half way and screened the other, with canvas covering.

Tramway, 16 lb. steel, 11,407 ft. track.
Tramway, 20 lb. steel, 281 ft. track.
Single rail, loose, 86 lin. ft.
Forms, already assembled, 4 about 20 x 25 ft.
Lumber, native, mostly oak, about third class, 1,579 ft. B. M.
Lumber, pine, about third class, 403 ft. B. M.
One cable bridge, 2" cable, 350 lin. ft.

78 All articles mentioned on this list are in good condition at this time.

Round Piles.

| Number. | Length. | Lin. ft. |
|---|---|---|
| 3 | 12 | 36 |
| 23 | 14 | 322 |
| 58 | 15 | 870 |
| 5 | 16 | 80 |
| 44 | 17 | 748 |
| 191 | 18 | 3,438 |
| 14 | 20 | 280 |
| 59 | 19 | 1,121 |
| 7 | 21 | 147 |
| 68 | 22 | 1,496 |
| 43 | 23 | 989 |
| 178 | 24 | 4,272 |
| 25 | 25 | 625 |
| 3 | 26 | 78 |
| 721 | | 14,502 lin. ft. |

Sheet Piling 4 x 12.

| Number. | Length. | Ft. B. M. |
|---|---|---|
| 89 | 25 | 8,900 |
| 17 | 26 | 1,768 |
| 2 | 20 | 160 |
| 2 | 24 | 192 |
| 110 | | 11,020 ft. B. M. |

Sheet Piling, Bolted and Ready for Use, 12 x 12, Called Wakefield.

| Number. | Length. | Ft. B. M. |
|---|---|---|
| 11 | 22 | 2,904 |
| 2 | 20 | 480 |
| 16 | 24 | 4,608 |
| 8 | 26 | 2,496 |
| 37 | | 10,488 ft. B. M. |

| | | | | |
|---|---|---|---|---|
| 79 | Bolts and washers for same ¾ x 12 in.... | No. | | 480 |
| | Cement ..... | " | sacks | 745 |
| Nails ..... | | " | lbs. | 1,100 |
| Oil, kerosene ..... | | " | gals. | 50 |
| Wood ..... | | " | cords | 50 |
| Gauges for pier..... | | " | ft. | 22 |
| Capstan levers ..... | | " | | 8 |
| Friction roller arms ..... | | " | | 8 |
| Journal boxes for dam ..... | | " | | 8 |
| Cast gate anchors ..... | | " | | 8 |
| Cast journals ..... | | " | | 52 |
| Bolts with washers, 12" long..... | | " | | 480 |

¾ in. cables, guys and hoisting, on derricks, lin. ft., 2,049.
⅝ in. cables, guys and hoisting, on derricks, lin. ft., 3,948.
1 in. cables, guys and hoisting, on derricks, lin. ft., 3,425.

If so requested in writing by the contractor, the United States will exercise the right conferred by paragraph 33 of the specifications forming part of the annulled contract with the Hubbard Building & Realty Company, to take possession of and retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of the same prepared for use or in use in the prosecution of the work at a valuation to be determined by the Engineer Officer in charge, and the contractor for the completion of the work will be permitted to use such plant and material in the prosecution of the work, for which he will be charged a fair rental or purchase value, to be determined by the Engineer Officer in charge. It must, however, be clearly understood that since the ownership of the above-mentioned plant and materials is not free from doubt, the United States does not undertake
80 to transfer title, does not guarantee peaceable possession and uninterrupted use, and will not defend any action or writ that may be instituted against the contractor concerning the same nor be responsible for nor assume any expenses or costs in connection therewith. Nothing that may result from the exercise of the above-mentioned right shall be made the basis of a claim against the United States or its officers or agents.

39. Supervision.—The work shall be conducted in strict accordance with the instructions of the Engineer Officer in charge. Any work done in disobedience to his instructions will not be paid for. The order of the work shall be subject to his approval. The contractor shall personally superintend the work during its progress or have it personally superintended by a competent and responsible representative duly accredited as such to this office. Any incompetent, insubordinate, disorderly, or objectionable employee of the contractor shall be dismissed from the work if required by the Engineer Officer in charge and not be re-employed. Such discharge shall not form the basis of any claim for compensation or damage upon the United States or any of its agents.

40. Inspection.—The United States will employ one or more inspectors on the work. The contractor, without additional compensation, shall, when required, furnish every facility for such inspectors and for the Engineer Officer in charge and his agent to supervise and inspect all work and materials, and to send and receive official mail. All transportation necessary for these purposes shall be promptly furnished by the contractor without expense to the United States. Whenever the contractor furnishes board and lodging to his own employees, he shall also, if required, furnish suitable board and lodging to such employees of the United States as are connected
81 with the work, at not to exceed fifteen dollars per month for each employee, to be paid for by the United States with the monthly payments.

41. Injury to Work.—The United States will not be responsible for the safety of the contractor's employees, plant or materials, nor for any damage done by or to them from any source or cause, and damages caused by the contractor or his employees to any portion of the Government work shall at once be properly repaired by the contractor, at his own expense. If the contractor does not at once repair such damages the United States may repair the same, and the entire cost of doing so will be deducted from the monthly payments due or

to become due the contractor. Any injury to work or loss of material, whether in cofferdams, concrete, or any other part of the construction, which may occur before the completion of the contract, from natural causes and without fault or negligence or delay on the part of the contractor, will be repaired or restored by the contractor at contract prices at the expense of the United States, and shall be paid for when possible under the unit prices of this contract, and when not so possible shall be paid for as specified in the clause "Extras and Changes." When the injury or loss, or where injury, loss or disfigurement of any kind is due to fault, negligence or delay on the contractor's part, the damage shall be made good by him to the satisfaction of the Engineer Officer, at contractor's expense. All the work contracted for must be placed in final working order to the satisfaction of the Engineer Officer in charge, before final payment is made. Acceptance or approval of, or payment for, any part of the work shall not release the contractor from the obligation to guard and to keep that part in good order and condition, and to repair at his own expense any defects that may develop in it, when such defects are due to faulty material or workmanship supplied by
82 him, until the completion and final acceptance of the work as a whole.

42. Use of U. S. Grounds.—The contractor, during the progress of the work, will have the privilege of using such portions of the Government land on both sides of the river at the site, for storage purposes, temporary buildings, etc., as are not otherwise used or reserved by the United States. It is understood, however, that the contractor shall, at any time during the progress of the work, promptly vacate and clean up any part of the Government land that may have been allotted to him, or be in use by him, whenever it is needed by the United States.

43. Time of Work.—Work shall generally be done between sunrise and sunset. Work at night, on Sundays, or on national holidays will not be permitted, except by authority of the Engineer Officer in charge. Should necessity arise for carrying on work at night, on Sundays, or on national holidays, this shall be done by the contractor to the extent directed by the Engineer Officer in charge.

44. Stakes and Templates.—The lines and levels for the work having been given on the ground by the Engineer Officer in charge, the contractor must conform and keep thereto, and all stakes and benches, after being placed, must be kept in position by the contractor without cost to the United States. The contractor shall furnish, at his own expense, the stakes required to lay out the work, as well as the labor required to place them or to remove them to other positions when so directed. He will also be required to furnish, without cost to the United States, all templates, and platforms, on the ground or elevated, that may be required at any time in building or laying out any part of the work.

45. Furnishing Labor.—The contractor shall furnish, upon
83 request of the Engineer Officer in charge, any labor needed to do occasional work, skilled or unskilled, which may be needed by the United States, in connection with this work. For skilled labor so supplied, the contractor shall receive thirty cents per hour per man, and for unskilled labor fifteen cents per hour per man. Any

labor or material (other than surveying instruments and special apparatus) required from time to time to aid the employees of the United States in inspecting, in making surveys, or in other matters connected with the work, shall be furnished by the contractor at cost price and will be paid for by the United States with the monthly payments, except where the contractor is herein specifically required to furnish such services, materials, etc., at his own expense. Where the cost of extra work or material can, in the opinion of the Engineer Officer in charge, be paid for on the basis of the unit price of the contract, these unit prices shall be used.

46. Complete Work.—The contractor is not to take advantage of any omission of details in drawings or specifications, or errors in either, but he will be required to do everything which may be necessary to carry out in good faith the contract, which contemplates everything complete, in good working order, of good material, with accurate workmanship, skilfully fitted and properly connected and put together. He must supply all materials and labor, all bolts, machinery, supplies, tools, cement and other sheds, quarters and such other plant, parts or structures as may be needed temporarily or permanently in order to complete the work according to the true intent of the contract.

47. Extras and Changes.—If it should become necessary to do any work or make purchases not covered by the unit prices of this contract, the contractor shall furnish the same at the current rates existing at the time of said purchase or work; said current rates to
84 be determined by the Engineer Officer in charge, and approved by the Chief of Engineers, and payment therefor to be made with the monthly payments. In all other cases where material changes from the specifications are deemed necessary, or for the interest of the Government by the Engineer Officer in charge, such changes, including the price for same, shall be agreed upon by the contracting parties beforehand in writing, and approved by the Secretary of War. But minor changes that involve no material increase in cost shall be made by the contractor, without additional compensation, whenever directed by the Engineer Officer in charge.

48. Rubbish to be Removed.—Within thirty days after the completion of the work, and before final payment is made, the contractor shall remove from the site all rubbish, old or unused material, etc., and shall fill up any excavation made for his convenience, as the Engineer Officer in charge may direct, and shall leave the whole in good order and satisfactory condition without expense to the United States.

52. Construction.—The cofferdams shall be placed and constructed as directed by the Engineer. They shall consist of two rows of three inch by twelve inch sheet piling, securely driven into hard clay, and properly secured to six inch by six inch stringers running horizontally with not more than five foot centers. The stringers to be fastened to round piling spaced six foot centers, and securely driven in the river bed. All to be properly bolted together, forming a cofferdam eight feet wide outside dimensions. The cofferdam to be filled with selected earth to be tamped when directed. A plank sluice of

approved construction shall be built in the cofferdams at the lower end, closed with plank needles.

85 56. Payment.—All excavated material used for cofferdam will be paid for as excavation only, no additional payment will be allowed for placing it in the cofferdams. Those portions which are ordered to be removed, as specified in paragraph 54, shall be again paid for at the full unit price for excavation, unless the materials are used again, when they shall be paid for as specified in the same paragraph. Piles driven shall be paid for as round piles. Timber in cofferdams, sluices, etc., will be paid for as timber in cribs. Iron tie rods will be paid for as iron and steel. For tamping of earth the necessary labor shall be furnished at cost price.

Form 19.

1. These Articles of Agreement entered into this 18th day of May, nineteen hundred and ten, between Captain A. E. Waldron, Corps of Engineers, United States Army, hereinafter designated as the contracting officer, representing the United States of America, of the first part, and J. G. White & Co., Inc., ..... ..... of ....., in the county of ....., State of Connecticut, hereinafter designated as the contractor, of the second part, Witnesseth, that the said parties do hereby covenant and agree, to and with each other, as follows:

2. In conformity with the advertisement and specifications hereunto attached (wherever the term "Engineer Officer in charge" is used in the specifications, it shall be understood to refer to the "contracting officer." The interlineations, the erasures, and the inserts appearing in the specifications hereunto attached, have been made prior to the signing of these articles of agreement), and the drawings referred to in paragraph 38 of the specifications, which form a part of this contract, the said contractor shall furnish all material

86 and labor necessary to complete Lock and Dam No. 6, Trinity River, Texas, and shall complete said lock and Dam No. 6, Trinity River, Texas, as outlined in paragraph 35 of these specifications, at the unit price given below, viz.:

Excavation at seventy-five cents ($0.75) per cubic yard.
Round timber, at sixteen cents ($0.16) per lineal foot.
Round piles at thirty-seven cents ($0.37) per lineal foot.
Brush at nine dollars and ninety-eight cents ($9.98) per cord.
Concrete at eleven dollars ($11.00) per cubic yard.
Boule gates at eighty dollars ($80.00) per M ft. board measure.
Oak timber at fifteen cents ($0.15) per foot board measure.
Timber in permanent work at seventy-five dollars ($75.00) per M ft. board measure.
Timber in cribs at forty-six dollars ($46.00) per M ft. board measure.
Riprap at five dollars and seventy-five cents ($5.75) per cubic yard.
Iron and steel at nine cents ($0.09) per pound.
Steel reinforcing rods at seven cents ($0.07) per pound.
Chain at nine cents ($0.09) per pound.

Drift bolts at six cents ($0.06) per pound.
Sheet piling at seventy-two dollars ($72.00) per M ft. board measure.
Sheet piling, steel, at one dollar and fifty cents ($1.50) per square foot.
Plain filling, at thirty cents ($0.30) per cubic yard.
Compacted filling, at fifty cents ($0.50) per cubic yard.
Riprap paving at twenty-seven cents ($0.27) per square foot.
Paving on spalls at thirty-two cents ($0.32) per square foot.
87 Paving in concrete at thirty-five cents ($0.35) per square foot.
Paving for cribs, at thirty-six and one-half cents ($0.36½) per square foot.
Sand bags, at ten cents ($0.10) each.
Gauges at three dollars ($3.00) per lineal foot.
Crab, crane and service car, at twenty-five cents ($0.25) per pound.
Frames with rollers, at five dollars ($5.00) each.
Drains under lock floor at fifty-five cents ($0.55) per lineal foot.
Payments to be made in the manner set forth in paragraph 30 of the specifications.

3. All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the United States, and such as do not conform to the specifications of this contract shall be rejected. The decision of the contracting officer as to quality and quantity shall be final.

4. The contractor shall commence, prosecute, and complete the work herein contracted for as set forth in paragraphs 31 and 35 of the attached specifications.

5. If the contractor shall delay or fail to commence with the delivery of the material or the performance of the work as specified herein, or shall in the judgment of the contracting officer fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case the contracting officer shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the contractor, and upon the giving of such notice all payments to the contractor under this contract shall cease, and all money or reserved percentage due or to become due there-
88 under shall be retained by the United States until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the contractor whatever sum may be expended by the United States in completing the said contract in excess of the price herein stipulated to be paid the contractor for completing the same, and also all costs of inspection and superintendence, including all necessary traveling expenses connected therewith, incurred by the said United States in excess of those payable by the said United States during the period herein allowed for the completion of the contract by the contractor; and the contracting officer may deduct all the above-mentioned sums out of or from the money or reserved percentage retained as aforesaid; and upon the giving of the said notice the contracting officer

shall be authorized to proceed to secure the performance of the work or delivery of the materials, by contract or otherwise, in accordance with law.

6. If the contractor shall fail to prosecute the work covered by this contract so as to complete the same within the time agreed upon, the contracting officer may, with the prior sanction of the Chief of Engineers, in lieu of annulling the contract under the preceding paragraph, waive the time limit and permit the contractor to finish the work within a reasonable period, to be determined by the contracting officer. Should the original time limit be thus waived, all expenses for inspection and superintendence, including all necessary traveling expenses connected therewith, and all other actual losses and damages to the United States due to the delay beyond the time originally set for completion, shall be determined by the contracting officer and deducted from any payments due or to become due the contractor: Provided, however, That no charge for inspection
89 and superintendence shall be made for such period after the date of expiration of this contract, as in the judgment of the contracting officer, approved by the Chief of Engineers, shall equal the time which shall have been lost through any cause for which the United States is responsible, either in the beginning or prosecution of the work, or in the performance of extra work ordered by the contracting officer, or on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by strikes, epidemics, local or State quarantine restrictions, or other unforeseeable cause of delay arising through no fault of the contractor, and which actually prevented such contractor from commencing or completing the work or delivering the material within the period required by the contract. The findings of the contracting officer, approved by the Chief of Engineers, shall be accepted by the parties hereto as final. But such waiver of the time and remission of charges shall in no manner affect the rights or obligations of the parties under this contract.

7. If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, That no payments shall be made unless such supplemental or modified agreement was signed
90 and approved before the obligation arising from such modification was incurred.

8. No claim whatever shall at any time be made upon the United States by the contractor for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the con-

tracting officer, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

9. The contractor shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

10. Until final inspection and acceptance of, and payment for, all of the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the contracting officer to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

11. The contractor shall hold and save the United States harmless from and against all and every demand, or demands, of any nature or kind for, or on account of, the use of any patented invention, article, or process included in the materials hereby agreed to be furnished and work to be done under this contract.

12. Payments shall be made to the contractor as prescribed in paragraph 30 of the specifications hereto attached and forming part of this agreement.

13. Neither this contract nor any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with
91 the transferrer or the transferee, but all rights of action for any breach of this contract by the said contractor are reserved to the United States.

14. No Member of or Delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom.* But this stipulation, so far as it relates to Members of or Delegates to Congress, is not to be construed to extend to this contract.

15. The term "contracting officer," wherever used in this contract, shall include the duly appointed successor of such officer.

16. In the prosecution of the work herein specified, the employment of persons undergoing sentences of imprisonment at hard labor which have been imposed by courts of the several States, Territories, or municipalities having criminal jurisdiction, is prohibited.

† 17. No mechanic or laborer employed on the work herein specified will be permitted or required by the contractor to work more than eight hours in any one calendar day except in case of extraordinary emergency.

‡ 18. This contract shall be subject to approval of the Chief of Engineers, U. S. A.

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*Here add to any contract made with an incorporated company for its general benefit the following words, viz: "But this stipulation, so far as it relates to Members of or Delegates to Congress, is not to be construed to extend to this contract."—See Sec. 3740, Revised Statutes.

† Cancel this paragraph in contracts to which the eight-hour law does not apply.

‡ When used for emergency contracts cancel this paragraph.

92 In Witness Whereof the parties aforesaid have hereunto placed their signatures the date first hereinbefore written.

Witnesses:

(Signed) J. H. ETHERIDGE,

As to A. E. WALDRON,

*Captain, Corps of Engineers, U. S. Army.*

Attest:

H. S. COLLETTE,

As to J. G. WHITE & CO., INC.,

By J. G. WHITE,

*President.*

[SEAL.] —— ——,

*Secretary.*

(Executed in triplicate.)

Approved June 6th 1910.

(Signed) W. L. MARSHALL,

*Brig. Gen., Chief of Engineers, U. S. Army.*

DEFENDANT'S EXHIBIT 5.

Ball Engineering Company,

P. De C. Ball, President.

Engineers and Contractors.

DALLAS, TEXAS, April 16th, 1910.

Capt. A. E. Waldron, Corps of Engineers, U. S. A., Dallas, Texas.

DEAR SIR: On March 19th we addressed a letter to you relative to certain boilers, engines, cars, etc, now at lock No. 6, all the personal property of Mr. P. D. C. Ball and asked that you take up this matter with the Chief of Engineers so that Mr. Ball could learn of the theory on which the government refuses to turn over this property to him.

93 We have heard nothing from you and would appreciate an early reply.

Yours truly,

BALL ENGINEERING CO.,

By OSCAR SHANKS.

DEFENDANT'S EXHIBIT 6.

P. De C. Ball, M. Am. Soc. M. E.
James P. Ball, Oscar Shanks, M. Am. Soc. C. E.

Ball Engineering Company,

P. De C. Ball, Proprietor.

Engineers and Contractors.

DALLAS, TEXAS, March 16, 1910.

Capt. A. E. Waldron, Corps of Engineers, U. S. A., Dallas, Texas.

DEAR SIR: There is now at lock No. 6, and has been since last September, in addition to the various boilers, hoisting engines, pile drivers, cars, tracks, etc.

1,481 sacks of cement
733 Round Piles
1,093 feet B. M. form lumber
11,004 feet B. M. Wakefield piling made up
11,052 feet B. M. Wakefield piling not made up
5,468 lbs. cast and wrought iron

all the personal property of Mr. P. D. C. Ball. The attention has heretofore been called a number of times to the fact that this property belongs to Mr. Ball. It can be used to advantage in the construction of work at Locks Nos. 2 and 4. The property has been deteriorating in value and will continue to deteriorate, some of it being of a perishable nature.

94 We would esteem it a great favor if you would again take up this matter with the Chief of Engineers, so that Mr. Ball can learn of the theory on which the Government refuses to turn over this property to him.

Yours very truly,

BALL ENGINEERING CO.,
By OSCAR SHANKS.

"DEFENDANT'S EXHIBIT 18."

War Department,

United States Engineer Office,

Federal Building,

DALLAS, TEXAS, April 28, 1910.

Ball Engineering Company, Dallas, Texas.

GENTLEMEN: I have to advise you that your letter of March 16, 1910 relative to certain property now at the site of Lock & Dam

No. 6, Trinity River, Texas, and claimed by Mr. Ball to be his personal property, was forwarded to the Chief of Engineers March 17th, and returned under date of April 25th, bearing indorsement reading as follows:

"1. Respectfully returned to Captain Waldron, who is authorized to inform the writer and other persons interested, that the Department is proceeding on the assumption that the title to the property is in the Hubbard Building & Realty Company, the contractor for the construction of lock 6, and that the United States has the right, under paragraph 33 of the specifications forming part of the
95 contract, to take possession of all or part thereof, under purchase at a valuation to be determined by the Engineer Officer in charge. It is not yet certain whether or not the United States will elect to exercise this right. If the right is exercised, the contractor will be allowed credit for the fair value of the plant and materials, in final settlement; if the right is not exercised, the property will be turned over to the contractor's representative.

2. The United States does not recognize Mr. Ball in this matter except as the representative or agent of the contractor, the Hubbard Building & Realty Company. If the Hubbard Building & Realty Company was using *it* on the work property belonging to Mr. Ball, it appears that Mr. Ball should have recourse to them, and not to the United States, to recover its value.

3. If the owners of the property can come to a satisfactory agreement with the contractors who are to complete the work, for the rental of the plant, and the purchase of the materials, it is probable that the United States will not attempt to exercise the right to purchase the property under paragraph 33 of the specifications.

4. If efforts are made, through action in the courts, or otherwise, to remove the property, this office should be promptly advised, in order that the Department of Justice may be requested to instruct the United States District Attorney to take charge of the defense."

The above information is deemed a reply to your letter of March 16, 1910.

Very respectfully,

A. E. WALDRON,
*Captain Corps of Engineers.*

96 Ball Engineering Company,

P. De C. Ball, President.

Engineers and Contractors.

DALLAS, TEXAS, June 8, 1910.

J. G. White Co., Ferris, Texas.

"DEFENDANT'S EXHIBIT 1."

M. W. C. Mar. 6, 1913.

GENTLEMEN: We beg to enclose a copy of our letter to Captain A. E. Waldron, Corps of Engineers, U. S. Army, Dallas, Texas, which is self explanatory.

Yours very truly,

P. D. C. BALL,
By OSCAR SHANKS.

June 8, 1910.

Captain A. E. Waldron, Corps of Engineers, U. S. A., Dallas, Texas.

"DEFENDANT'S EXHIBIT 2."

M. W. C. Mar. 6, 1913.

DEAR SIR: We beg to acknowledge the receipt of a copy of your letter to the Hubbard Building and Realty Co. and note that the J. G. White Co., the party who has the contract for the completion of Lock & Dam No. 6, Trinity River, Texas, has requested that the United States take possession of certain machinery, tools, materials, etc., in accordance with paragraph 33 of the original specifications, and which are now at the lock site, and also note that the conditions under which the Government proposes to take possession are given in "Insert E" following paragraph 33 of the specifications for
97 completion of Lock and Dam No. 6, Trinity River, Texas.

The property in question does not belong to the Hubbard Building & Realty Co., but is the personal property of Mr. P. D. C. Ball and Mr. Ball does not agree, nor consent to the use of any of his property, until a satisfactory arrangement has been made with the Government or the J. G. White Co. as to the purchase price of the material and the rental value of the plant as may be needed by the Government, and protests against either the J. G. White Co., or the U. S. Government taking any manner of possession of any of the property until Mr. Ball is paid for it.

In accordance with your request, Mr. Ball will remove his property within the next thirty days.

Yours very truly,

P. D. C. BALL,
By OSCAR SHANKS.

C. St. L.
J. G. W. Co.

"DEFENDANT'S EXHIBIT 22."

War Department,

United States Engineer Office,

Federal Building,

DALLAS, TEXAS, June 6, 1910.

Hubbard Building & Realty Co., Mr. George A. Carden, President, Dallas, Texas.

GENTLEMEN: J. G. White & Co., Inc., the party who has contract for the completion of lock and dam No. 6, Trinity River,
98 Texas, has requested that the United States take possession of the following items, formerly used in the prosecution of your contract (now annulled) for the construction of said lock and dam No. 6:

All leases, rights of way or quarry privileges held by the Hubbard Building & Realty Co. in connection with this work included under this contract, including leased houses, leases of ground upon which houses or other structures have been constructed outside the Government boundary, rights of way for tracks, tramways, pipelines, etc., together with the sand and gravel quarry located about one and one-half miles from the work.

The detailed list of plant, equipment, material and buildings required is as follows:

1—anvil
2—40 H. P. boilers with fittings
1—orange peel bucket
2—1 yd. bottom dump concrete buckets
10—1½ yd. Western Dump Cars
10—Koppell 1 yard cars
1—1 yard Smith Concrete Mixer
1—Derrick, cottonwood mast and broom with derrick fittings and guy wires, but without hoisting cable standing on north end of wall
1—Derrick, steel mast and boom, with fittings and guy lines, but without hoisting cables
1—Drill Press
3—3-Drum Hoisting Engines
1—Forge
1—Grindstone
1—Steam Hammer with Leads
1—Jack Screw
1—Smith-Vaile Pump, 2" discharge
1—Smith-Vaile Pump, 3" discharge
1—Pump, 1½" discharge
1—3" Steam Pipe Line 600 ft. long
1—2" Steam and Water Pipe line 294 ft. long
99 1—Vise
1—600 gallon Cypress Water Tank

3—Crosscut Saws
Blacksmith's blower and small tools
1—Cement Shed
1—Blacksmith Shop
1—Material House
1—2-story Bunk House
1—Mess Room
1—Kitchen and Commissary
1—Office Building
3—Bunk Houses
1—Tramway, 16 lb. steel, 11,407 ft. of track
1—Tramway, 20 lb. steel, 281 ft. of track
86—lineal ft. loose rail
1—Suspension Bridge 350 ft. span

Round Piles.

As applying to the accompanying list of round and sheet piling, we note that some of this has apparently been injured by exposure to the wind and sun without proper protection. We request that possession be taken only of such material as is satisfactory to the Government for incorporation in the work.

| | Number. | Length. | Lineal feet. |
|---|---|---|---|
| | 3 | 12 | 36 |
| | 23 | 13 | 322 |
| | 58 | 15 | 870 |
| | 5 | 16 | 80 |
| | 44 | 17 | 748 |
| | 191 | 16 | 3,438 |
| | 14 | 20 | 280 |
| 100 | 59 | 19 | 1,121 |
| | 7 | 21 | 147 |
| | 66 | 22 | 1,496 |
| | 43 | 23 | 989 |
| | 178 | 24 | 4,272 |
| | 25 | 25 | 625 |
| | 3 | 26 | 78 |
| | 721 | | 14,502 |

Sheet Piling 4 x 12.

| Number. | Length. | Ft. B. M. |
|---|---|---|
| 89 | 25 | 8,900 |
| 17 | 26 | 1,760 |
| 2 | 20 | 160 |
| 2 | 24 | 192 |
| 110 | | 11,020 ft. B. M. |

Wakefield Sheet Piling, Bolted and Ready for Use, 12 x 12.

| Number. | Length. | Ft. B. M. |
|---|---|---|
| 11 | 22 | 2,904 |
| 2 | 20 | 480 |
| 16 | 24 | 4,608 |
| 8 | 26 | 2,496 |
| 37 | | 10,488 |

480—Bolts with washers ¾ x 12
1,100—lbs. Nails
50—cords of wood
22—ft. gauges for pier
8—Capstan Levers
8—Friction Roller Arms
101 8—Journal Boxes for Dam
8—Cast Gate Anchors
52—Cast Journals
1—Still for Water
1—set Derrick Fittings

These are taken possession of under the provisions of paragraph 33 of the original specifications, which form part of the contract. The conditions under which the Government takes possession are given in Insert "E" following paragraph 38 of the specifications for the completion of Lock and Dam No. 6, Trinity River, Texas, which reads:

"If so requested in writing by the contractor, the United States will exercise the right conferred by paragraph 33 of the specifications forming part of the annulled contract with the Hubbard Building & Realty Company, to take possession of and retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of the same prepared for use or in use in the prosecution of the work at a valuation to be determined by the Engineer Officer in Charge, and the contractor for the completion of the work will be permitted to use such plant and material in the prosecution of the work, for which he will be charged a fair rental or purchase value, to be determined by the Engineer Officer in charge. It must, however, be clearly understood that since the ownership of the above-mentioned plant and materials is not free from doubt, the United States does not undertake to transfer title, does not guarantee peaceable possession and uninterrupted use, and will not defend any action or writ that may be instituted against the contractor concerning the same, nor be responsible for nor assume any expenses or costs in connection therewith. Nothing that may result from the exercise of the above-mentioned right shall be made the basis of a claim against the United States or its officers or agents."

102 Due to other business which requires my attention for the next two weeks, it will be impossible for me to place a fair rental value on the items of plant and a fair purchase value on such materials as are used, much before the end of the present month.

You are hereby informed that such other property and materials

as you have at lock and dam No. 6, Trinity River, Texas, not quoted above, neither the government nor the contractor desires to take possession of. You are therefore requested to remove the same, or give notice of its abandonment within the next thirty days.

Very respectfully,

A. E. WALDRON,
*Captain Corps of Engineers.*

A. E. W./b.

Copy of this letter sent to:
Ball Engineering Co., Dallas, Texas.
United Surety Co. of Maryland, Baltimore, Md.
Mr. E. G. Williams, Construction Manager for J. G. White & Co., Inc., c/o The Southland Hotel, Dallas, Texas.
Mr. John Erhardt, U. S. Inspector.

"DEFENDANT'S EXHIBIT 23."

War Department,

United States Engineer Office,

Federal Building.

DALLAS, TEXAS, June 6, 1910.

Mr. E. G. Williams, Construction Manager, for J. G. White & Co., Inc., Southland Hotel, Dallas, Texas.

SIR: Your letter of to-day's date in which you request the Government to take possession of certain items of machinery and material, as well as leases, rights-of-way, etc., has been received .

103 Inclosed herewith is a copy of letter addressed to Hubbard Building & Realty Company, Mr. Geo. A. Carden, President, which shows the action I have taken in this matter. A copy of this letter will be sent to Mr. P. D. C. Ball at the Ball Engineering Company, who claims ownership of most of the machinery and material at the locksite.

The fact that the material and machinery is on the Government reservation, or in the near vicinity thereof, and the circumstances under which this office has not permitted its removal from the locksite, is sufficient to assume that the Government has possession of the items you speak of, at the present time. They are therefore turned over to you under the conditions contained in Insert "E" following paragraph 38 of the specifications for the construction of Lock and Dam No. 6, Trinity River, Texas, for use in further work on lock and dam No. 6, Trinity River, Texas.

Very respectfully,

A. E. WALDRON,
*Captain Corps of Engineers.*

1 inclo.—copy of letter. A. E. W./b.

"DEFENDANT'S EXHIBIT 24."

War Department,

United States Engineer Office,

Federal Building.

DALLAS, TEXAS, June 9, 1910.

Mr. P. D. C. Ball, c/o Ball Engineering Company, Dallas, Texas.

SIR: I am in receipt of your letter of June 8th, referring to a copy of a letter from this office of June 6th written to Hub-
104 bard Building & Realty Company, Mr. George A. Carden, President, in reference to the Government taking possession of certain property at lock and dam No. 6, Trinity River, Texas.

You say: "The property in question does not belong to the Hubbard Building & Realty Co., but is the personal property of Mr. P. D. C. Ball * * *," etc., and: "In accordance with your request, Mr. Ball will remove his property within the next thirty days." Your attention is again invited to the items set out below, these items being also listed in the copy of letter of June 6th:

"All leases, rights of way or quarry privileges held by the Hubbard Building & Realty Co. in connection with this work included under this contract, including leased houses, leases of ground upon which houses or other structures have been constructed outside the Government boundary, rights of way for tracks, tramways, pipe lines, etc., together with the sand and gravel quarry located about one and one-half miles from the work.

The detailed list of plant, equipment, material and buildings required is as follows:

1—anvil
2—40 H. P. boilers with fittings
1—orange peel bucket
2—1 yd. bottom dump concrete buckets
10—1½ yd. Western Dump Cars
10—Koppell 1 yard cars
1—1 yard Smith Concrete Mixer
1—Derrick, cottonwood mast and boom with derrick fittings and guy wires, but without hoisting cable standing on north end of wall
1—Derrick, steel mast and boom, with fittings and guy lines, but without hoisting cables
105 1—Drill Press
3—3-drum Hoisting Engines
1—Forge
1—Grindstone
1—Steam Hammer with leads
1—Jack Screw
1—Smith-Vaile Pump, 2" discharge
1—Smith-Vaille Pump, 3" discharge
1—Pump, 1½" discharge

1—3" Steam Pipe Line 600 ft. long
1—2" Steam and Water Pipe line 294 ft. long
1—Vise
1—600 gallon Cypress Water Tank
3—Crosscut Saws
Blacksmith's blower and small tools
1—Cement Shed
1—Blacksmith's Shop
1—Material House
1—2 Story Bunk House
1—Mess Room
1—Kitchen and Commissary
1—Office Building
3—Bunk Houses
1—Tramway, 16 lb. steel, 11,407 ft. of track
1—Tramway, 20 lb. steel, 281 ft. of track
86—lineal ft. loose rail
1—Suspension Bridge 350 ft. span

Round Piles.

"As applying to the accompanying list of round and sheet piling, we note that some of this has apparently been injured by exposure to the wind and sun without proper protection. We request that possession be taken only on such material as is satisfactory to the Government for incorporation in the work:

106

| Number. | Length. | Lineal feet. |
|---|---|---|
| 3 | 12 | 36 |
| 23 | 14 | 322 |
| 58 | 15 | 870 |
| 5 | 16 | 80 |
| 44 | 17 | 748 |
| 191 | 16 | 3,438 |
| 14 | 20 | 280 |
| 59 | 19 | 1,121 |
| 7 | 21 | 147 |
| 66 | 22 | 1,496 |
| 43 | 23 | 989 |
| 178 | 24 | 4,272 |
| 25 | 25 | 625 |
| 3 | 26 | 78 |
| 721 | | 14,502 |

Sheet Piling 4 x 12.

| Number. | Length. | Ft. B. M. |
|---|---|---|
| 89 | 25 | 8,900 |
| 17 | 26 | 1,760 |
| 2 | 20 | 160 |
| 2 | 24 | 192 |
| 110 | | 11,020 ft. B. M. |

Wakefield Sheet Piling, Bolted and Ready for Use, 12 x 12.

| Number. | Length. | Ft. B. M. |
|---|---|---|
| 11 | 22 | 2,904 |
| 2 | 20 | 480 |
| 16 | 24 | 4,608 |
| 8 | 26 | 2,496 |
| 37 | | 10,488 ft. B. M. |

107 480—Bolts with washers ¾ x 12
1,100—lbs. Nails
50—cords of wood
22—ft. gauges for pier
8—Capstan Levers
8—Friction Roller Arms
8—Journal Boxes for Dam
8—Cast Gate Anchors
52—Cast Journals
1—Still for Water
1—set Derrick Fittings."

Any attempt to remove any of the above listed items will be considered as a trespass, as the Government has actually taken physical possession of the property under the terms of the annulled contract.

For, and in the absence of Captain A. E. Waldron,
Very respectfully,

R. C. SMEAD,
*Assistant Engineer.*

"DEFENDANT'S EXHIBIT 25."

War Department,

United States Engineer Office,

Federal Building.

DALLAS, TEXAS, June 22, 1910.

Mr. F. W. Ward, Construction Superintendent for J. G. White & Co., Inc., Ferris, Texas.

SIR: Referring to the property recently seized by the Government at lock and Dam No. 6, Trinity River, Texas, and turned over to you, I inclose herewith memorandum invoice for same, and a form for receipt.

108 Please check these over with Mr. Erhardt, sign the receipt, and return same to this office. If you wish to make any change as to the number of articles you receive (as for instance in the round piles and the sheet piling), please take the matter up in detail with Mr. Erhardt.

Very respectfully,

A. E. WALDRON,
*Captain Corps of Engineers.*

"DEFENDANT'S EXHIBIT 25-1."

*Receipt for Property Transferred to J. G. White & Company, Incorporated, by John Erhardt, Government Inspector at Lock and Dam No. 6, Trinity River, Texas.*

1—anvil
2—40 H. P. Boilers with fittings
1—orange peel bucket
2—1 yd. bottom dump concrete buckets
10—1½ yd. Western Dump cars
10—Koppell 1 yd. cars
1—1 yd. Smith Concrete Mixer
1—derrick, cottonwood mast and boom with derrick fittings and guy wires, but without hoisting cable standing on north end of wall
1—derrick, steel mast and boom, with fittings and guy lines, but without hoisting cables
1—drill press
3—3-drum hoisting engines
1—forge
1—grindstone
1—jack screw
1—Smith-Vaile Pump, 2" discharge
1—Smith-Vaile Pump, 3" discharge
109 1—Pump, 1½" discharge
1—3" steam and water pipe line 600 ft. long
1—2" steam and water pipe line 294 ft. long
1—vise
1—600 gallon Cypress Water Tank
3—Crosscut saws
Blacksmith's blower and 48 small tools
1—Cement shed
1—Blacksmith shop
1—Material House
1—2 story bunk house
1—mess room
1—kitchen and commissary
1—office building
3—bunk houses
1—tramway, 16 lb. steel, 11,407 ft. of track
1—tramway, 20 lb. steel, 281 ft. of track
86—lineal ft. loose rail
1—suspension bridge, 350 ft. span

Round Piles.

| Number. | Length. | Lineal feet. |
|---|---|---|
| 3 | 12 | 36 |
| 23 | 14 | 322 |

Received the above listed articles, this 18th day of —, 1910.
J. G. WHITE & COMPANY, INC.,
By F. W. WARD,
*Const. Sup't.*

"DEFENDANT'S EXHIBIT 25-2."

*Receipt for Property Transferred to J. G. White & Company, Incorporated, by John Erhardt, Government Inspector at Lock and Dam No. 6, Trinity River, Texas.*

110

Round Piles.

| Number. | Length | Lineal feet. |
|---|---|---|
| 27 | 14 | 378 |
| 44 | 15 | 660 |
| 7 | 16 | 112 |
| 42 | 17 | 714 |
| 175 | 18 | 3,150 |
| 43 | 19 | 817 |
| 20 | 20 | 400 |
| 11 | 21 | 231 |
| 60 | 22 | 1,320 |
| 43 | 23 | 969 |
| 146 | 24 | 3,504 |
| 24 | 25 | 600 |
| 8 | 26 | 208 |
| 1 | 37 | 37 |
| | | 10,768 |

Sheet Piling 4 x 12.

| Number. | Length. | Ft. B. M. |
|---|---|---|
| 2 | 16 | 128 |
| 1 | 19 | 76 |
| 2 | 20 | 160 |
| 103 | 25 | 10,300 |
| 1 | 26 | 104 |
| | | 10,768 |

Wakefield Sheet Piling, Bolted and Ready for Use.

| Number. | Length. | Ft. B. M. |
|---|---|---|
| 2 | 20 | 480 |
| 1 | 21 | 252 |
| 10 | 22 | 2,640 |
| 13 | 24 | 3,744 |
| 111 5 | 25 | 1,500 |
| 3 | 26 | 936 |
| | | 9,552 |

480—bolts with washers, ¾ x 12
1,100—lbs. nails
50—cords of wood
22—ft. gauges for pier
8—capstan levers
8—friction roller arms
8—journal boxes for dam
52—cast journals
1—still for water
1—set derrick fittings

Received the above listed articles, this 18th day of July, 1910.

J. G. WHITE & COMPANY, INC.,
By F. W. WARD,
*Const. Sup't.*

(Stamp:) "Plaintiff's Exhibit D."

Sten. M. W. C. Mar. 11, 1913.

War Department,

United States Engineer Office,

Federal Building.

DALLAS, TEXAS, November 10, 1910.

Register.

Hubbard Building & Realty Co., Mr. Geo. A. Carden, President, Dallas, Texas.

GENTLEMEN: J. G. White & Co., Inc., has notified this office that it has no further use for the following items of plant retained
112 by the Government for the use of the new contractor for the completion of lock and dam No. 6, Trinity River, Texas, and desires to relinquish possession of same:

| Estimated total value. | |
|---|---|
| $100.00 | 2 — 1 yd. bottom dump concrete buckets. |
| 1,200.00 | 1 — triple drum Thos. Carlan Hoisting Engine with hoisting engine attached |
| 600.00 | 1 — Flory Triple Drum Hoisting Engine. |
| 50.00 | 1 — Smith-Valle pump, 2″ discharge. |
| 75.00 | 1 — Smith-Valle pump, 3″ discharge. |
| 25.00 | 1 — pump, 1½″ discharge. |
| $2,050.00 | total assessed value of articles desired to be returned. |

The rent on this machinery will terminate on November 15, 1910, as that date is considered to be a reasonable one upon which you could have taken possession of the machinery. Should the machinery not be removed from the locksite by December 15, 1910,

such action will be taken as an indication on your part of your intention to abandon same.

In fixing the rental on these items June 22, 1910, depreciation was figured at the rate of 33⅓ per cent. per annum, and interest allowed at 6 per cent. per annum: therefore to estimate amount of reduced rental for return of these articles I take:

| | |
|---|---|
| 33⅓% of $2,050.00 | $683.33 |
| 6% of $2,050.00 | 123.00 |
| | $806.33 |

and fix the deduction at $70.00 per month.

113 Hubbard Building & Realty Co.

November 10, 1910.

| | | |
|---|---|---|
| The rate fixed for the entire plant taken was. | $380.00 | per month. |
| Deduct, as per above | 70.00 | " " |
| Leaves the rental to be paid commencing November 15, 1910 | $310.00 | " " |

Very respectfully,
(Signed) A. E. WALDRON,
*Captain Corps of Engineers.*

A. E. W./b.

"PLAINTIFF'S EXHIBIT E."

Sten. M. W. C. Mar. 11, 1913.

War Department,

United States Engineer Office,

Federal Building.

DALLAS, TEXAS, January 30, 1911.

Register.

Hubbard Building & Realty Co., Mr. Geo. A. Carden, President, Dallas, Texas.

GENTLEMEN: J. G. White & Co., Inc., has indicated to this office that it has no further use for the various items of plant retained by the Government for the use of the new contractor for the completion of lock and dam No. 6, Trinity River, Texas, and desires to relinquish possession of same.

The items of plant, possession of which it is now desired
114 to relinquish, are described in my letter to you of June 22, 1910 fixing the rental value on same, as follows:

1 Anvil.
2 40 H. P. Boilers with fittings.
1 Orange peel bucket.
10 1½ yd. Western Dump Cars.
10 Koppell 1 yard cars.
1 1 yd. Smith Concrete mixer.
1 Derrick, cotton wood mast and boom with derrick fittings and guy wires, but without hoisting cable standing on north end of wall.
1 Derrick, steel mast and boom, with fittings and guy lines, but without hoisting cables.
1 Drill Press.
1 3-drum hoisting engine.
1 Forge.
1 Grindstone.
1 Jack Screw.
1 3″ steam pipe line 600 ft. long.
1 2″ steam and water pipe line 294 ft. long.
1 Vise.
1 600 gallon Cypress water tank.
3 crosscut saws.
Blacksmith's blower and small tools.
1 Cement Shed.
1 Blacksmith Shop.
1 Material House.
1 2-story bunk house.
1 Mess Room.
1 Kitchen and commissary.
1 Office building.
3 Bunk Houses.
1 Tramway, 16 lb. steel, 11,407 ft. of track.
1 Tramway, 20 lb. steel, 281 ft. of track.
86 lineal feet Loose Rail.
115 1 Suspension Bridge, 350 ft. span.
1 still for water.
1 set Derrick Fittings.

I therefore have to inform you that the rent on this machinery will terminate on January 31, 1911, and you will be given until February 28, 1911 to take possession of the same. Should the machinery not be removed from the locksite by February 28, 1911, such action will be taken as an indication on your part of your intention to abandon same.

The plant, possession of which it is now desired to relinquish, is in addition to that heretofore relinquished, as per my letter of November 10, 1910.

Very respectfully,

(S.) A. E. WALDRON,
*Captain Corps of Engineers.*

"DEFENDANT'S EXHIBIT 30."

Sten. M. W. C. Mar. 11, 1913.

*Telegram.*

The Postal Telegraph-Cable Company of Texas.

Received at 243 Main St., Dallas, Texas (Telephones Main 900 and 941).
296 CX Y 59—Collect Govt.

WASHINGTON, D. C., Feb. 3-11.

Captain Waldron, Federal Bldg., Dallas, Tex.:

Reference plant lock six Trinity surety co-objects strongly to return of any plant to Hubbard Building and Realty Co. or to any other claimant. Withdraw your letter Jan'y thirtieth to Hubbard Building and Realty Co. and retain possession of all plant till further advised by this office.

BIXBY,
*Chief of Eng'rs.* 3.40 P. M.

116 "DEFENDANT'S EXHIBIT 32."

War Department,

United States Engineer Office,

Federal Building.

DALLAS, TEXAS, February 3, 1911.

Register.

Hubbard Building & Realty Co., Mr. Geo. A. Carden, President, Dallas, Texas.

Sten. M. W. C. Mar. 11, 1913.

GENTLEMEN: On January 30, 1911, I sent you a letter by registered mail, stating that J. G. White & Co., Inc., had indicated to this office that it had no further use for the various items of plant retained by the Government for the use of the new contractor for the completion of lock and dam No. 6, Trinity River, Texas, and desired to relinquish possession of the same. The items, possession of which it was desired to relinquish, were listed in the said letter, and you were informed that the rent on these articles would terminate on January 31, 1911 and you would be given until February 28, 1911 to take possession of the same.

I am today in receipt of telegraphic instructions from the Chief

of Engineers, Washington, D. C., directing that I withdraw the letter above referred to, and retain possession of all plant until further advised by him.

I therefore now advise you that I hereby withdraw my said letter of January 30, 1911, and that the telegraphic instructions of the Chief of Engineers will govern in the premises.

Very respectfully,
(S.) A. E. WALDRON,
*Captain Corps of Engineers.*

A. E. W./b.

117 "DEFENDANT'S EXHIBIT 33."

War Department,
United States Engineer Office,
Federal Building.

Sten. M. W. C. Mar. 11, 1913.

DALLAS, TEXAS, February 3, 1911.

Mr. John Ehrhardt, Inspector, Lock & Dam No. 6, Trinity River, R. F. D. No. 1, Crisp, Texas.

SIR: I enclose herewith copy of letter written this day to Hubbard Building & Realty Co., Mr. Geo. A. Carden, President, which is self-explanatory.

In view of the telegraphic instructions from the Chief of Engineers, cited in letter copy of which is enclosed, you will under no circumstances allow the Hubbard Building & Realty Co., or any other claimant, to take possession of any item of plant or machinery at lock and dam No. 6, Trinity River, Texas.

An acknowledgment of this letter is requested.

Very respectfully,
(S.) A. E. WALDRON,
*Captain Corps of Engineers.*

1 inclos.—copy of letter.
b

GEORGE D. WATROUS,
*Committee.*

118 In the United — District Court, Holden at Hartford, in and for the District of Connecticut, on the 24th day of May, 1916.

Present: Hon. Edwin S. Thomas, Judge.

The United States District Court in and for the District of Connecticut, May 24th, 1916.

At Law. No. 813.

BALL ENGINEERING COMPANY, of St. Louis, Missouri, a Corporation Organized and Existing under the Laws of the State of Missouri,

v.

J. G. WHITE & COMPANY, INCORPORATED, of Bridgeport, Connecticut, a Corporation Organized and Existing under the Laws of the State of Connecticut.

*Judgment.*

This action, by summons and complaint claiming Twenty Thousand Dollars ($20,000) damages, as on file, came to this Court, on the first Monday of June, 1911, when the parties appeared and were at issue, as on file, and said action by consent of the parties was referred to George D. Watrous, Esquire, of New Haven, as sole Committee, to hear and determine the same and report his findings of fact and conclusions of law; and said Committee on November, 1913, filed his report in this Court and his findings and conclusions that the defendant had unlawfully converted the personal property described in the plaintiff's complaint, and that the plaintiff was entitled to judgment in its favor for Fifteen Thousand Dollars ($15,000) with interest; and said report was duly accepted
119 by this Court and judgment was entered on the 23rd day of April, 1914, as of March 31, 1914, on the report of said Committee in favor of the plaintiff and against the defendant and awarding the sum of Eighteen Thousand Three Hundred and Sixty-two Dollars and Fifty cents, ($18,362.50), to the above-named plaintiff; and the defendant having appealed from said judgment to the United States Circuit Court of Appeals for the Second Circuit, before which Court the transcript of the record in this Court was brought by virtue of a writ of error, and the mandate of the said United States Circuit Court of Appeals, for the Second Circuit in this case being duly filed on the 29th day of April, 1915, in the office of the Clerk of this Court directing that said judgment be reversed with costs taxed at the sum of Nine Hundred and Seven Dollars and Eighty Cents ($907.80), and that this Court take such further proceedings in accordance with a decision of the United States Circuit Court of Appeals for the Second Circuit, as according to right and justice and the laws of the United States ought to be had; and an order was duly entered in this Court by consent of the parties on

March 13, 1916, referring said action again to George D. Watrous, Esquire, of New Haven, as sole Committee, to hear and determine the same and to report his findings of fact and conclusion of law to this Court.

Said action came by continuance to the 27th day of April, 1916, when said Committee returned his report to this Court; and the Court, having heard the parties, and counsel, for the plaintiff having appeared and remonstrated against the acceptance of said report on the ground that the said Committee erred in his conclusions as set forth in said report and numbered 6 and 7, accepts said report and finds the facts to be as therein stated and sustains the con-
120 clusions of law as set forth in said report and therefore finds the issues for the defendant, to conform to the said decision of the said United States Circuit Court of Appeals.

Whereupon, it is adjudged that the defendant do have and recover of and from the plaintiff his costs taxed at — Dollars.

EDWIN S. THOMAS,
*U. S. District Judge.*

121 District Court of the United States for the District of Connecticut.

At Law. No. 813.

BALL ENGINEERING COMPANY,

v.

J. G. WHITE & COMPANY

*Stipulation as to Record.*

It is hereby stipulated that the record on the writ of error to the District Court of the United States for the District of Connecticut in the above entitled action consist of the following:

1. Petition for writ of error and order allowing same.
2. Writ of eror.
3. Citation.
4. Writ and complaint.
5. Answer.
6. Reply.
7. Order of reference to Committee.
8. Stipulation waiving jury.
9. Report of Committee and exhibits made a part of the report or referred to therein.
10. Judgment entered on the 24th day of May, 1916.
11. Stipulation *de* record.
12. Certification of record by the Clerk.

The filing of any additional bond on the part of the plaintiff-in-error is hereby waived.

Dated at Stamford, Conn., this 22nd day of August, 1916.

CUMMINGS & LOCKWOOD,
*Attorneys for Plaintiff in Error.*
LEWIS SPERRY,
*Attorney for Defendant in Error.*

122 United States District Court, District of Connecticut.

At Law. No. 813.

BALL ENGINEERING COMPANY

v.

J. G. WHITE & COMPANY.

*Stipulation.*

It is hereby stipulated and agreed that the Clerk of the United States District Court for the District of Connecticut shall have his time for transcribing and filing the record in the above entitled cause on writ of error in the Circuit Court of Appeals for the Second Circuit extended to the first day of November, 1916.

CUMMINGS & LOCKWOOD,
*Attorneys for Plaintiff.*
LEWIS SPERRY,
*Attorneys for Defendant.*

123 United States District Court, District of Connecticut.

At Law. No. 813.

BALL ENGINEERING COMPANY,

v.

J. G. WHITE & COMPANY.

*Stipulation.*

It is hereby stipulated and agreed that the Clerk of the United States District Court for the District of Connecticut shall have his time for transcribing and filing the record in the above entitled cause on writ of error in the Circuit Court of Appeals for the Second Circuit extended to the 29th day of November, 1916.

CUMMINGS & LOCKWOOD,
*Attorneys for Plaintiff.*
LEWIS SPERRY,
*Attorneys for Defendant.*

124 United States District Court, District of Connecticut.

At Law. No. 813.

BALL ENGINEERING COMPANY,

v.

J. G. WHITE & COMPANY.

*Stipulation.*

It is hereby stipulated and agreed that the Clerk of the United States District Court for the District of Connecticut shall have his time for transcribing and filing the record in the above entitled cause on writ of error in the Circuit Court of Appeals for the Second Circuit extended to the 30th day of December, 1916.

CUMMINGS & LOCKWOOD,
*Attorneys for Plaintiff.*
LEWIS SPERRY,
*Attorneys for Defendant.*

125 *Certification of Clerk.*

UNITED STATES OF AMERICA,
*District of Connecticut, ss:*

I, C. E. Pickett, Clerk of the District Court of the United States for the District of Connecticut, Second Circuit, do hereby certify that the foregoing pages numbered from 1 to 125, inclusive, contain a true transcript of the record and proceedings had in said Court, as consented to by the written stipulation of the parties hereto annexed, in the case of The Ball Engineering Company, Plaintiff in Error, versus The J. G. White Company, Defendants in Error, At Law No. 813.

I further certify that my fees for preparing and forwarding said transcript are $35, which have been paid to me by counsel for the plaintiff in error.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of Hartford, in the District of Connecticut, in the Second Circuit, this 20th day of December, one thousand nine hundred and sixteen.

C. E. PICKETT, *Clerk.*

126 United States Circuit Court of Appeals, for the Second Circuit, October Term, 1916.

No. 209.

Argued March 8, 1917. Decided April 17, 1917.

BALL ENGINEERING COMPANY, Plaintiff in Error,

v.

J. G. WHITE & COMPANY, Defendant in Error.

In Error to the District Court of the United States for the District of Connecticut.

Before Ward, Rogers and Hough, Circuit Judges.

*Per Curiam:*

Having examined the record presented by this writ, we are of opinion that it differs in no material fact from that considered in 233 Fed. Rep. 618. Therefore the decision then made is binding, the issues have been adjudicated, and the judgment below is affirmed with costs.

127 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court-rooms in the Post-office Building in the City of New York, on the 27th day of April, one thousand nine hundred and seventeen.

Present: Hon. Henry G. Ward, Hon. Henry Wade Rogers, Hon. Charles M. Hough, Circuit Judges.

BALL ENGINEERING COMPANY, Plaintiff in Error,

v.

J. G. WHITE & COMPANY, Defendant in Error.

Error to the District Court of the United States for the — District of Connecticut.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the — District of Connecticut, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. W. R.

128 Endorsed: United States Circuit Court of Appeals, Second Circuit. Ball Co. v. J. G. White Co. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 27, 1917. William Parkin, Clerk.

129 UNITED STATES OF AMERICA,
*Southern District of New York, ss:*

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 128 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Ball Engineering Company against J. G. White & Company as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 21st day of June in the year of our Lord One Thousand Nine Hundred and Seventeen and of the Independence of the said United States the One Hundred and forty-first.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
*Clerk.*

130 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Ball Engineering Company is plaintiff in error and J. G. White & Company is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the District of Connecticut, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

131 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the eighteenth day of October, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
*Clerk of the Supreme Court of the United States.*

[Endorsed:] File No. 26,056. Supreme Court of the United States, No. 589, October Term, 1917. Ball Engineering Company

vs. J. G. White & Company. Writ of Certiorari. Filed Nov. 7, 1917. United States Circuit Court of Appeals, Second Circuit. William Parkin, Clerk.

132 United States Circuit Court of Appeals for the Second Circuit.

BALL ENGINEERING COMPANY, Plaintiff in Error,

v.

J. G. WHITE & COMPANY, Defendant in Error.

The Supreme Court of the United States having granted a writ of certiorari in the above case, it is hereby stipulated that the certified transcript of record on file herein in the office of the clerk of the United States Supreme Court may be taken as the return to said writ.

Dated October 31st, 1917.

CHARLES LOCKWOOD,
CUMMINGS & LOCKWOOD,
*Attorneys for Ball Engineering Company, Plaintiff in Error.*

LEWIS SPERRY,
J. KEMP BARTLETT,
*Attorneys for J. G. White & Company, Defendants in Error.*

133 To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of said court, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York, November 9th, 1917.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
*Clerk of the United States Circuit Court of Appeals for the Second Circuit.*

134 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Ball Engineering Co. v. J. G. White & Co. Return to Certiorari.

135 [Endorsed:] File No. 26,056. Supreme Court U. S. October term, 1917. Term No. 589. Ball Engineering Co., Petitioner, vs. J. G. White & Company. Writ of certiorari and return. Filed November 12, 1917.

Office Supreme Court, U. S.
FILED
JUL 23 1917
JAMES D. MAHER
CLERK

# Supreme Court of the United States

OCTOBER TERM, 1917, No. 227

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BALL ENGINEERING COMPANY,
*Petitioner,*

*against*

J. G. WHITE & COMPANY, a corporation,
*Respondent.*

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**Notice of Motion, Motion, Petition and Brief on Application for Certiorari to the United States Circuit Court of Appeals for the Second Circuit.**

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HOMER S. CUMMINGS,
*Attorney for Petitioner,*
*Ball Engineering Company.*

CHAS. P. YOUNG CO., Printers, 19 Beaver St., N. Y.

# Supreme Court of the United States of America.

BALL ENGINEERING COMPANY,
*Petitioner,*

*against*

J. G. WHITE AND COMPANY, a corporation,
*Respondent.*

Notice of Application for Writ of Certiorari.

SIRS:

Please take notice that the annexed petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit will be presented to the Supreme Court of the United States, at the Capitol in Washington, District of Columbia, on the first day of October, 1917, at the opening of Court at 12 o'clock noon of that day, or as soon thereafter as counsel can be heard.

Dated, Stamford, Conn., July 18, 1917.

Yours, etc.,
HOMER S. CUMMINGS,
*Attorney for Ball Engineering Company.*

CHARLES D. LOCKWOOD,
WILLIAM M. PARKE,
*Of Counsel.*

To:
LEWIS SPERRY, Esq.,
*Attorney for Respondent.*

# SUPREME COURT OF THE UNITED STATES OF AMERICA.

BALL ENGINEERING COMPANY,
*Petitioner,*

*against*

J. G. WHITE AND COMPANY,
*Respondent.*

Motion for Issuance of Writ of Certiorari to United States Circuit Court of Appeals for the Second Circuit.

Now comes the petitioner, Ball Engineering Company, by its counsel, and prays this Honorable Court that it shall, by Certiorari or other proper process directed to the Honorable Judges of the United States Circuit Court of Appeals, for the Second Circuit, require said Court to certify to this Court for its review and determination a certain cause in said Court of Appeals lately pending, wherein this petitioner was the plaintiff in error and J. G. White and Company was the defendant in error, the same being number 209 on the docket of said Circuit Court of Appeals for the October Term, 1916, and to that end said petitioner now tenders herewith its petition, together with the duly certified copy of the entire record herein in said Circuit Court of Appeals.

Dated, Stamford, Conn., July 18, 1917.

HOMER S. CUMMINGS,
*Attorney for Petitioner.*

# SUPREME COURT OF THE UNITED STATES OF AMERICA.

| | |
|---|---|
| BALL ENGINEERING COMPANY, *Petitioner,*<br>*against*<br>J. G. WHITE AND COMPANY, *Respondent.* | Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit. |

To the HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

The petition of the Ball Engineering Company above named respectfully shows to this Court on information and belief as follows:

In 1906, the United States entered into a contract with the Hubbard Building & Realty Company, a corporation, for the construction of Lock and Dam No. 6 on the Trinity River, Texas. The contract was annulled by the United States in 1909. The United States then entered into a contract in May, 1910, with J. G. White & Company, the respondent, for the completion of the work. J. G. White & Company endeavored to purchase from the petitioner certain tools, machinery, plant and materials belonging to the petitioner, on the site of Lock and Dam No. 6, but could not agree with the petitioner on price. Thereupon the respondent, knowing that the property did not belong to the Hubbard Building & Realty Company and that it did belong to the petitioner, requested the United States to seize

it under the annulment clause (paragraph 33) of the original contract between the United States and the Hubbard Building & Realty Company. The United States thereupon, under a mistaken theory of its rights under paragraph 33 of the original contract, to be more fully referred to hereafter, seized the said property, having first entered into an agreement with the respondent that all liability for the seizure should be upon the respondent and not upon the Government. The Government further coupled the seizure with an express declaration, both to the respondent and to the petitioner, that the seizure was made by the United States by virtue of its rights under paragraph 33 of the original contract with the Hubbard Building & Realty Company.

This is an action of conversion by the petitioner against the respondent for converting the said property. The Committee who heard the case, the United States District Court, and the Circuit Court of Appeals have all decided that the United States was without authority to seize the petitioner's property under paragraph 33 of the contract between the United States and the Hubbard Building & Realty Company. The Committee and the United States District Court, upon the first trial, rendered judgment in favor of the plaintiff for the value of the property converted. The Circuit Court of Appeals reversed the decision of the District Court on the ground that the United States seized the property as sovereign under the right of eminent domain, and acquired title, and that therefore the respondent was not liable for conversion. Upon a second trial the Committee and the District Court were constrained

to render judgment in favor of the defendant to conform to the decision of the Circuit Court of Appeals. Such judgment was affirmed by the Circuit Court of Appeals on the second appeal and that mandate of affirmance is the judgment which petitioner desires this court to review. Upon the argument in the Circuit Court of Appeals, the Assistant Attorney General and the United States Attorney for the District of Connecticut appeared and filed a brief on behalf of the United States as *amicus curiae,* in opposition to the claim that the United States had seized the petitioner's property as sovereign under the right of eminent domain.

The petitioner desires this Court to review the decision of the Honorable Circuit Court of Appeals, which is to the effect that, when the United States seizes property acting solely under the alleged rights of the Government under the terms of a written contract by virtue of which the Government claims to have the right to seize and retain the property without payment to the owner, that although the Government's claim as to its rights under the contract is held to be without merit so that it appears that the United States did not have the authority to seize the property under the contract, nevertheless the United States will be held to have seized the property as sovereign, or, in other words, in the exercise of the right of eminent domain.

The facts in detail are as follows:

I.—On July 10, 1906, the United States entered into a contract with Hubbard Building & Realty Company, a corporation organized under the laws of the State of Texas, whereby said Company agreed to construct Lock and Dam No. 6

on the Trinity River, Texas (Record, fol. 72). On September 9, 1909, work on the Lock and Dam was discontinued, and on October 22, 1909, the Government in accordance with its provisions annulled the contract with the Hubbard Building & Realty Company (Record fols. 80-81). At the time of such annulment there was then situated upon the land belonging to the United States, being the site of Lock and Dam No. 6, a considerable amount of personal property consisting of machinery, tools, plant and materials, all of which belonged to one P. D. C. Ball and none of which had ever been owned by the Hubbard Building & Realty Company, the corporation having the contract with the Government as aforesaid (Record, fols. 73-74, 76-78). On April 2, 1910, the petitioner, Ball Engineering Company, was incorporated under the laws of the State of Missouri, and said Ball transferred to it all of the personal proporty above mentioned. Said property was still upon the site of Lock and Dam No. 6 (Record, fols. 70-72).

II.—On March 16, 1910 and on April 16, 1910, respectively, the said Ball and petitioner notified the United States Engineer in Charge of the work on Lock and Dam No. 6, in writing, that the personal property above referred to belonged to said Ball and demanded its return by the United States Government. (Record, fols. 275-280, Defendant's Exhibits 5 & 6.) On April 28, 1910, the said Engineer in Charge wrote to the petitioner stating that the United States claimed that it had the right

> "under paragraph 33 of the specifications forming part of the contract, to take pos-

session of all or part [of personal property above referred to], under purchase at a valuation to be determined by the Engineer Officer in charge. It is not yet certain whether or not the United States will elect to exercise this right. If the right is exercised, the contractor [the Hubbard Building and Realty Company which did not own the property] will be allowed credit for the fair value of the plant and materials, in final settlement; if the right is not exercised the property will be turned over to the contractor's representative.

"The United States does not recognize Mr. Ball in this matter except as the representative or agent of the contractor, the Hubbard Building & Realty Company. If the Hubbard Building & Realty Company was using on the work property belonging to Mr. Ball, it appears that Mr. Ball should have recourse to them, and not to the United States, to recover its value" (Record, fols. 281-285, Defendant's Exhibit 18).

Paragraph 33 of the contract between the United States Government and the Hubbard Building & Realty Company, referred to in said Defendant's Exhibit 18, reads as follows:

"3. Annulment.—In case of the annulment of this contract as conditionally provided for in the form of contract adopted and in use by the Engineer Department of the Army, the United States shall have the right to take possession of, wherever they may be,

and to retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of same prepared for use or in use in the prosecution of the work, together with any or all leases, rights of way or quarry privileges, under purchase, at a valuation to be determined by the Engineer Officer in charge" (Record, fols. 144-145).

III.—Subsequent to the date of the letters of March and April, 1910, referred to above, and prior to May 18, 1910, there were negotiations between the respondent, J. G. White and Company (which was then contemplating the making of an agreement with the Government to complete the construction of the lock and dam) and the petitioner, Ball Engineering Company, for the purchase or rental of said personal property by the respondent from the petitioner, but said negotiations failed to result in an agreement between said parties (Record, fols. 88-89).

IV.—On May 18, 1910, the United States entered into a written contract with the respondent, J. G. White and Company, for the completion of the construction of Lock and Dam No. 6. Said contract after referring to and enumerating the articles of personal property belonging to the petitioner and located on the site of Lock and Dam No. 6, contained the following provision, designated as "Insert E following paragraph 38":

"If so requested in writing by the contractor, the United States will exercise the right conferred by paragraph 33 of the speci-

fications forming part of the annulled contract with the Hubbard Building & Realty Company, to take possession of and retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of the same prepared for use or in use in the prosecution of the work at a valuation to be determined by the Engineer Officer in charge and the contractor for the completion of the work will be permitted to use such plant and material in the prosecution of the work, for which he will be charged a fair rental or purchase value, to be determined by the Engineer Officer in charge. *It must, however, be clearly understood that since the ownership of the above-mentioned plant and materials is not free from doubt, the United States does not undertake to transfer title, does not guarantee peaceable possession and uninterrupted use, and will not defend any action or writ that may be instituted against the contractor concerning the same nor be responsible for nor assume any expenses or costs in connection therewith. Nothing that may result from the exercise of the above-mentioned right shall be made the basis of a claim against the United States or its officers or agents.''* (Record, fols. 236-238). (Our italics.)

V.—Notwithstanding the above declaration on the part of the United States contained in the contract with the respondent, the Honorable Circuit Court of Appeals has held that although the United States declared that it seized the property by virtue of said paragraph 33, which it

was without authority to do, it took the property as sovereign and acquired title, so that the respondent obtained from it the right to possession as against the petitioner. If the decision of the Honorable Circuit Court of Appeals is not reversed, then whenever the United States attempts to take property by virtue of a contract, it must be held to be a sovereign taking, if the government acts beyond its rights under the contract. This is a new and novel principle which compels the United States to act as sovereign, although it expressly states that it acts by virtue of a written contract, and thereby impliedly declares that it does not act as sovereign.

VI.—The respondent by a letter dated May 18, 1910, to the United States Engineer in charge of the work at Lock and Dam No. 6, requested the Government to take possession of the personal property of the petitioner above referred to, in accordance with the provisions of paragraph 33 of the original contract between the Government and the Hubbard Building & Realty Company and the provisions of Insert E of the contract between the United States and the respondent (both of which have been quoted hereinabove) (fols. 190-192).

VII.—In accordance with said request and on June 6, 1910, the Government Engineer in charge of said work notified the petitioner in writing that the respondent had made such request and that said articles of personal property "are taken possession of under the provisions of paragraph 33 of the original specifications which form a

part of the contract" (Record, fols. 89-91; Defendant's Exhibit 22, fols. 290-305), and that

> "The conditions under which the Government takes possession are given in Insert 'E' following paragraph 38 of the specifications for the completion of Lock and Dam No. 6, Trinity River, Texas, which reads:"

following which the letter contained a copy of the provisions of Insert E. On the same date (June 6, 1910) the United States Engineer in charge of the work sent to the respondent a copy of said letter, Defendant's Exhibit 22, together with a letter addressed to the respondent, Defendant's Exhibit 23, which stated that said Ball and the Ball Engineering Company claimed ownership of said personal property (Record, fols. 306-308, Defendant's Exhibit 23); and also stating that the personal property was turned over to the respondent "under the conditions contained in Insert 'E' following paragraph 38 of the specifications for the construction of Lock and Dam No. 6, Trinity River, Texas, for use in further work on Lock and Dam No. 6, Trinity River, Texas" (Record, fols. 91-92).

VIII.—On June 8, 1910, a notice was sent on behalf of the petitioner to said respondent, J. G. White and Company, stating that the personal property above referred to did not belong to the Hubbard Building and Realty Company, but was the personal property of said Ball (Record, fol. 89), and the same notice was also sent on the same date to the United States Engineer in charge of said work (Record, fols. 286-290, Defendant's Exhibits 1 and 2).

On June 9, 1910, the United States Engineer in charge sent a letter to the petitioner (Defendant's Exhibit 24) acknowledging the receipt of said letter and reiterating the claim of the Government of its alleged right to take possession of the property under the terms of the annulled contract (fols. 310; 320).

IX.—On February 3, 1911, the United States Chief of Engineers at Washington, D. C., by telegram, advised the Engineer Officer in charge of the work at Lock and Dam No. 6 that the surety upon the annulled contract of the Hubbard Building & Realty Company objected to the return of the plant to any claimant (Defendant's Exhibit 30, fol. 345), and on the same day the Engineer Officer notified in writing the United States Inspector upon the work that he should not under any circumstances allow any claimant to take possession of any item of property or machinery on the site of Lock and Dam No. 6. Said property of petitioner remained on the site of Lock and Dam No. 6 (fols. 101-102, Defendant's Exhibit 33).

X.—In the accounts between the United States and the Hubbard Building and Realty Company, kept at the office of the engineer of the United States at Dallas, Texas, entries were made by employees of the United States crediting the Hubbard Building and Realty Company with the valuation of said property as determined by the engineer officer in charge. After the deduction of this credit a balance was by the account shown to be due from the Hubbard Building and Realty Company to the United States (Record, fols. 97-98; 103-104).

XI.—In May, 1911, petitioner, as the plaintiff, brought suit against the respondent, as the defendant, in the United States District Court for the District of Connecticut for the conversion of the property above referred to (fols. 19-32). The respondent filed an answer in which it attempted to justify the possession and use of the petitioner's property on the theory that the United States had the right to and did acquire title to that property by virtue of the provisions of paragraph 33 of the specifications of the contract between the United States and the Hubbard Building and Realty Company, dated July 10, 1906. No allegation of the answer in any way suggested that it was claimed that the Government had acquired title in any way or by any right other than in the attempted exercise of such right as it might have under paragraph 33 of said contract (Answer, fols. 34-54).

XII.—Thereafter the case came on for trial before a referee (referred to under the Connecticut practice as a committee) and the respondent offered proof in an endeavor to justify the taking of the property by the Government under the provisions of paragraph 33 of said contract. The committee made a report which contained findings of fact which were substantially identical with those contained in the second report of the committee printed at fols. 67-103 of the record filed herewith. Upon the first trial the committee found certain conclusions which are contained in the present conclusions and numbered 3, 4 and 5, and which in substance were to the effect

> that paragraph 33 of the contract between the United States and the Hubbard Building

and Realty Company did not as a matter of law authorize the United States to purchase materials, tools, etc., belonging to a third party in the absence of the agreement of such third party and owner to assent to the provisions of paragraph 33; that paragraph 33 did not authorize the United States to purchase materials, tools, etc., prepared for use or in use in the prosecution of the work, save on payment to the owner of a valuation; that said paragraph 33 did not authorize the United States to retain materials, tools, etc., whether the property of the contractor or of other parties, upon the payment of a rental value to be determined by the engineer officer in charge; and that the United States did not acquire any title or right to the possession of said property of the petitioner by virtue of paragraph 33 (fols. 105-107).

XIII.—The committee accordingly found in his first report that the respondent had wrongfully and unlawfully converted the property of the petitioner and fixed the value of said property at $15,000. The United States District Court entered judgment in favor of the petitioner and against the respondent upon said report, (Ball Engineering Company *v.* J. G. White & Company, 212 Fed., 1009). The respondent thereafter sued out a writ of error to the United States Circuit Court of Appeals for the Second Circuit, and upon the argument contended for the first time that the petitioner's property was taken by the United States as sovereign under the right of eminent domain, although no such allegations

had been set forth in the respondent's answer nor had any such contention been made before the committee on the trial or before the District Court.

XIV.—That said Circuit Court of Appeals, in deciding the case on such first writ of error, stated in its opinion that the committee was correct in his rulings that the United States had no right to take the property of the petitioner by virtue of anything contained in the contract between the United States and the Hubbard Building and Realty Company. Said Court also held, however, that the United States took the property as sovereign under the right of eminent domain and thereby acquired title and that the respondent was therefore not guilty of conversion. The judgment in favor of your petitioner was therefore reversed and a new trial ordered. The second trial was had before the same committee and he, after finding the facts substantially as upon the first trial, was compelled, in deference to the decision of the Circuit Court of Appeals, to hold as a conclusion of law that "the Government of the United States took title to said property as sovereign and on or about the 6th day of July, 1910, leased said property to the defendant, and the defendant took possession thereof and thereafter used the same, but was not guilty of conversion by reason thereof" (fol. 108).

XV.—Judgment was entered upon said report by the District Court and a writ of error was sued out to the Circuit Court of Appeals by the petitioner. The Circuit Court of Appeals handed

down an opinion on such second writ of error stating that the case was substantially identical with that which was before it on the prior appeal and that it was bound to follow its former decision and accordingly affirm the judgment (Opinion, fols. 376-377).

XVI—The errors in the decision of the Circuit Court of Appeals assigned by this petitioner are as follows:

Said Circuit Court of Appeals was in error;

(*a*) In holding that the taking of property by the Government, in pursuance of its alleged rights under a private contract, does not constitute a proprietary taking and is a taking under the right of eminent domain.

(*b*) In holding that, even if the taking of property by an officer of the Government is tortious, the Government acquires title and can be compelled to pay to the owner the reasonable value of the property taken.

An examination of the record in this case and the opinions rendered by the Honorable Circuit Court of Appeals in this case and in the case of *United States* v. *Buffalo-Pitts Co.*, 114 C. C. A., 119, 193 Fed., 905, will show that said Court has definitely adopted as rules of substantive law these erroneous propositions. The decision of said Court is irreconcilable with the decisions of this Court upon the same subject and with those of the Courts of co-ordinate jurisdiction and has created confusion and uncertainty in the law with reference to the effect of the taking of property by officers of the Government when purporting to act under the

terms of contracts between the Government and private citizens, with reference to the right of private citizens to recover from individual and corporate tort feasors when such tort feasor claims to have acted under authority of an officer of the Government, and as to the effect upon the title to property tortiously taken by an officer of the Government or by a private tort feasor acting under the supposed authority of an officer of the Government. It is obvious that these questions, arising as they do almost constantly between officers of the Government and persons who have tools and material upon Government reservation or are engaged in performing work on Government contracts, are of the utmost importance, both to the Government and to such private persons. It is extremely important that this Court, by granting *certiorari* in this case, determine these vexed questions so that the confusion and uncertainty now existing on these questions may be cleared away.

WHEREFORE, your petitioner prays that this Honorable Court may be pleased, in the light of the provisions of the Act of January 28, 1915, to grant a writ of *certiorari* in this case to the United States Circuit Court of Appeals for the Second Circuit to bring up this case to this Honorable Court for such proceedings therein as to this Honorable Court may seem just.

Dated, New York, July 18, 1917.

BALL ENGINEERING COMPANY,
by Homer S. Cummings
*Attorney.*

UNITED STATES OF AMERICA,
State and District of Connecticut, } ss:
County of Fairfield,

HOMER S. CUMMINGS, being duly sworn, deposes and says, that he is the attorney for the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

That the source of deponent's information and the grounds of his belief as to the matters therein stated to be alleged upon information and belief are the testimony, exhibits and proceedings in this case. That the reason why this verification is not made by the petitioner is that it is a corporation of the State of Missouri, and that none of its officers resides or is within the State of Connecticut.

HOMER S. CUMMINGS.

Sworn to before me this 18th day of July, 1917.

Raymond E. Hadsell

*Notary Public.*
Fairfield County.

I hereby certify that I have read the foregoing petition and am familiar with the contents thereof. The grounds therein stated in support of the application made for a writ of *certiorari* herein are in my opinion well founded in point of law. This application is not made for purposes of delay.

HOMER S. CUMMINGS,
*Attoney for Petitioner.*

July 18, 1917.

The United States, believing that the decision of the Court below is erroneous, and that its ruling to the effect that the United States is liable on an implied contract where property is taken by one of its agents under the circumstances disclosed in this record will have an important and detrimental effect on the rights of the United States under contracts of this character, and having filed a brief in the Court below, as *amicus curiae;* hereby joins in the prayer of this petition.

JOHN W. DAVIS,
*Solicitor General.*

# Supreme Court of the United States of America.

BALL ENGINEERING COMPANY,
*Petitioner,*

*against*

J. G. WHITE AND COMPANY,
*Respondent.*

## Brief for Petitioner.

This is an action for conversion against J. G. White & Company, a corporation, for converting to its own use and using certain material, tools, plant, etc., belonging to the Ball Engineering Company, the petitioner.

Prior to May 18, 1910, the respondent, J. G. White & Company, was in negotiation with the petitioner for the purchase or rental of the petitioner's machinery, tools and material on the site of Lock and Dam No. 6 (Report of Committee, fols. 88-89). The negotiations did not result in an agreement (*ibid.*) Thereupon the respondent, on May 18, 1910, entered into a contract with the United States for the completion of Lock and Dam No. 6 (fol. 89). That contract contained a clause ("Insert E") by the terms of which the United States bound itself to "exercise the right conferred by paragraph 33 of the specifications forming part of the annulled contract with the Hubbard Building & Realty Company to take pos-

session of and retain all material, tools," etc., on the site of the Lock and Dam and to turn the same over to the respondent for use on the work (Record, p. 101). The clause also contained the following significant language:

> "It must, however, be clearly understood that since the ownership of the above-mentioned plant and materials is not free from doubt, the United States does not undertake to transfer title, does not guarantee peaceable possession and uninterrupted use, and will not defend any action or writ that may be instituted against the contractor (J. G. White, the respondent here) concerning the same, nor be responsible for nor assume any expenses or costs in connection therewith. Nothing that may result from the exercise of the above-mentioned right shall be made the basis of a claim against the United States or its officers or agents."
>
> (Record, p. 101; Report of Committee, fol. 87, also pp. 79-80.)

In accordance with the foregoing provisions of its contract with the United States, the respondent, by letter dated May 18, 1910, requested the Government to seize the petitioner's material, tools, etc., on the Lock and Dam site (Record, pp. 30-31; Defendant's Exhibit 20, pp. 63-64). The Engineer Officer in charge of the work for the United States thereupon did seize the petitioner's property, coupling the seizure with an express statement in writing to both the petitioner and the respondent that the material, tools, etc., "are taken possession of under the provisions of Paragraph 33" of the Hubbard Building & Realty

Company contract with the Government, and that the conditions under which the seizure was made by the United States were those set forth in "Insert E" contained in the contract between the United States and the respondent, referred to above (Record, pp. 30, 101).

Immediately upon receiving notice of the seizure the petitioner protested in writing both to the Government and to the respondent (Record, pp. 30-31; letters of June 8, 1910, pp. 96-97).

The findings of the Committee establish, and in fact it has never been disputed, that the United States seized the petitioner's property solely in pursuance of the Government's alleged rights under the terms of its contract with the Hubbard Building & Realty Company and under the claim that the Government had the right under the terms of that contract to take the *petitioner's* property located upon the Lock and Dam site and to give credit for the value, as fixed by the Engineer Officer, upon the indebtedness of the *Hubbard Building & Realty Company to the United States, without payment or credit of any kind to the petitioner, the owner of the property.* (Findings 17, 18, 19, 26 and 32, Record, pp. 30-35; see also Defendant's Exhibit 18, pp. 94-95; Exhibit 21, pp. 79-80; Exhibit 22, pp. 97-102; Exhibit 20, pp. 63-64. All of the above exhibits are by reference incorporated in and form part of the Report of the Committee.)

The Government's position was succinctly stated in Defendant's Exhibit 18, a letter from Captain Waldron, the Engineer Officer in charge, to the petitioner, in April, 1910, setting forth the contents of a letter from the United States Chief

of Engineers Bixby at Washington to Captain Waldron (Record, pp. 94-95; Committee's Report, fol. 88):

> "The United States has the right, under paragraph 33 of the specifications forming part of the contract, to take possession of all or part thereof (petitioner's property) under purchase at a valuation to be determined by the Engineer Officer in charge. * * * If the right is exercised, the contractor (Hubbard Building and Realty Co., which company did not own the property) will be allowed credit for the fair value of the plant and materials in final settlement; * * * The United States does not recognize Mr. Ball in this matter except as the representative or agent of the contractor, the Hubbard Building & Realty Company. If the Hubbard Building & Realty Company was using on the work property belonging to Mr. Ball, it appears that Mr. Ball should have recourse to them, and not to the United States, to recover its value."

The respondent's answer in the present suit followed the same theory and alleged in effect that the United States had the right to and did take the petitioner's property by virtue of paragraph 33 of the contract between the Government and the Hubbard Building & Realty Company (Record, pp. 13-15). The case was defended before the Committee on the first trial on the same theory. Both the Committee and the District Court rejected that defense and rendered a decision in favor of the petitioner (there plaintiff). The Circuit Court of Appeals agreed with the lower Courts in their rejection of that theory and stated:

> "The Committee and the court below correctly held that the Government had no right to take the property of the plaintiff, a third party, by virtue of anything contained in its contract with the Hubbard Company."
>
> *J. G. White & Co.* v. *Ball Engineering Co.*, 223 Fed. Rep., 618; 139 C. C. A., 164.

The theory upon which the Circuit Court of Appeals reversed the first judgment, which was in favor of the petitioner, and affirmed the second judgment, which was in favor of the respondent, will be found stated in the opinion of the Circuit Court of Appeals handed down on its decision of the first writ of error and reported at 223 Fed. Rep., 618, and 139 C. C. A., 164. For the convenience of the Court a copy of said opinion is hereto annexed and marked "Schedule A." In that opinion the Court, after summarizing the facts found by the Committee and stating that—

> "The Committee and the court below correctly held that the Government had no right to take the property of the plaintiff, a third party, by virtue of anything contained in its contract with the Hubbard Company,"

reached the conclusion that the judgment of the Court below, in favor of the petitioner, should be reversed for the following reasons, as stated in the opinion:

> "All the same it (the Government) did take the property with knowledge that it was claimed by the plaintiff and used it in the construction of this public work. It was as sovereign entirely competent to do this sub-

ject to the obligation of making just compensation, as required by the fifth amendment to the Constitution. It made no proprietary claim and therefore was bound to pay the real owner of the property, whether the taking was tortious or not. It fully recognized this obligation by crediting the Hubbard Company with the value. The fact that it recognized the wrong person as owner and erroneously relied upon the contract with the Hubbard Company, by which the plaintiff was not bound, in no respect changed the material fact that it had taken the property and acquired title thereto. The defendant in its answer justified by virtue of title in the United States which was the material consideration, although it followed the erroneous theory that the Government was justified in acting as against the plaintiff under the contract with the Hubbard Company.

* * * * * * *

"We have considered this general subject in U. S. *v.* Buffalo-Pitts. Co., 193 Fed. Rep., 905, affirmed 234 U. S., 228. In accordance with that decision we think that the Government took title to the property in question and leased it to the defendant, who in using it was not guilty of any conversion. The judgment is reversed."

The opinion of the learned Circuit Court of Appeals asserts (1) that although the United States in seizing the petitioner's property acted solely in pursuance of the alleged rights of the United States under paragraph 33 of the contract between the United States and the Hubbard Building & Realty Company, nevertheless the seizure, made solely under such an alleged con-

tractural right of the Government, did not constitute a *proprietary* taking, but was a taking under the right of eminent domain, or, in other words, a taking as sovereign; (2) that even if the taking was tortious, the Government acquired title and can be compelled to pay to the owner the reasonable value of the property taken. We submit that both propositions are fundamentally and wholely erroneous.

## I.

**The taking of the petitioner's property by the officers of the United States was not a taking under the right of eminent domain, but was a proprietary taking under a doctrine of private law which did not in any way rest upon the rights of the Government as sovereign and which, if correct in theory, would have been equally available to any private citizen under similar circumstances.**

(*a*) The legal proposition asserted by the learned Circuit Court of Appeals may be stated in general terms as follows: That when the Government appropriates property of which it does not claim to be the absolute owner in fee, and for which it does not claim to have already paid in full at the time of the taking, such an appropriation is *ipso facto* a taking by the Government *as sovereign,* upon an implied contract to pay the owner just compensation, notwithstanding the fact that the Government takes the property un-

der the claim that the owner has by bringing it upon the site of certain Government work, subjected it to the terms of a contract between the Government and the third person, and that under the terms of that contract the Government has the right to take the property upon giving credit to the third person, who is indebted to the Government, and without any payment or credit to the owner of the property.

The doctrine thus enunciated by the learned Circuit Court of Appeals seems to have had its origin in the opinion of that Court in the case of *United States* v. *Buffalo-Pitts Company,* 114 C. C. A., 119; 193 Fed., 905, at pp. 906-907. It is true that the Buffalo-Pitts case was affirmed by this Court (234 U. S., 228), but the opinion of this Court shows conclusively that it rejected the theory upon which the Circuit Court of Appeals had decided the case, and that the affirmance by this Court was because the findings of the trial Court, which were conclusive on this Court, established the Government's use of the claimant's property without disputing his title or denying his right to compensation, and because an Act of Congress authorized the taking involved in that case. This Court said in part:

> "We think the Circuit Court and the Circuit Court of Appeals were right in concluding that, under the facts found, the United States was liable upon an implied contract. As to the plaintiff, it is specifically found that it left the property with the defendant, relying upon the fact that its title to the property under the mortgage was not disputed, and upon the representations made to it, and consented to the defendant's retaining posses-

sion of the property in expectation of receiving compensation for it; as to the government, it is found that it was well known to it that the chattel mortgage existed, and its validity was undisputed, and that it would continue the use of the engine and appurtenances, and, if left in its possession, payment would be recommended for such use.

* * * * * * *

"While the Government claimed the right to thus take and use the property, it nevertheless held it *without denying the right of the owner to compensation*" (pp. 232-233). (Our italics.)

(*b*) The opinion of the Circuit Court of Appeals in the *Buffalo-Pitts* case referred to and apparently relied upon the following language in the opinion of Mr. Justice Brewer in the *Lynah* case:

"The rule deducible from these cases is that when the Government appropriates property which it does not claim as owner, it does so under an implied contract that it will pay the value of the property it so appropriates." (U. S. *v.* Lynah, 188 U. S., 445, at p. 464.)

This language must, however, be considered in view (1) of the *facts* of the *Lynah* case, (2) of the *language used elsewhere in the opinion in that case,* and (3) of the *other and more recent decisions of this Court.*

(1) In the Lynah case the Government had appropriated property belonging to the plaintiffs, by flooding their land in the course of making a public improvement. The Government did

not deny the title of the plaintiffs and there was no question at any stage of the case, but that if compensation was to be paid, the plaintiffs were the persons entitled thereto. The Government did not claim that through any contract entered into with any third person it had the right to flood the plaintiff's lands and pay or give credit to the third person for the value of the property taken. Mr. Justice Brewer, who delivered the opinion of the Supreme Court in the Lynah case, thus summarized the position of the Government:

> "The government did not deny the title of the plaintiffs. It averred in the answer simply that it had 'no knowledge or information sufficient to form a belief,' but did not couple such averment with any denial, nor did it pretend that it *owned* the property or had a *paramount proprietary right to its possession.* It did not put in issue the question of title, but rested upon a denial that the acts its officers had done by its direction had overflowed the land and wrought the injury as alleged, or that such overflow and injury created an implied contract, and also upon the bar of the statute of limitations. *Nowhere in the record did it set up any title to the property antagonistic to that claimed by the plaintiffs.* It simply denied responsibility for what it had caused to be done, and pleaded that if it had ever been liable the statute of limitations had worked a bar. * * * While there was no formal admission of record that the land belonged to the plaintiff's, the case was tried alone upon the theory that the government could not be held responsible for what it had done" (pp. 460-1). (Our italics.)

It will be noticed that Mr. Justice Brewer in the passage from his opinion quoted above, pointed out that the Government did not claim either (a) to *own the property* or (b) to *have a paramount proprietary right to its possession,* thus distinguishing between *ownership* and a *paramount proprietary right to possession.* In the case at bar while the Government did not claim to own the property, it did claim to have a paramount proprietary right to its possession as against the petitioner and without any obligation to pay the petitioner.

Moreover, the opinion of Mr. Justice Brewer refers specifically to the fact that the Government did not "set up any title to the property antagonistic to that claimed by the plaintiffs." In the case at bar the reverse is true—indeed, the only claim which was set up was absolutely antagonistic to petitioner's, namely, a claim that the government had under its contract with the Hubbard Building & Realty Company a right to take petitioner's property without payment to petitioner.

(2) Mr. Justice Brewer in his opinion in the Lynah case discussed practically all of the cases theretofore decided by the Supreme Court which involved a determination as to what facts establish a taking by the Government as sovereign upon an implied contract to pay its value, and what facts establish a mere tortious taking. The opinions in each of the cases thus cited contained a discussion as to whether there was or was not an implied contract between the Government and the owner of the property to the effect that com-

pensation was to be paid the owner or whether the facts showed that there was no meeting of the minds, so that the taking was tortious. Thus Mr. Justice Brewer quoted from the opinion of Mr. Justice Gray in the case of *Hill* v. *U. S.*, 149 U. S., 593, in which Mr. Justice Gray, referring to the cases of *U. S.* v. *Great Falls Manufacturing Co.*, 112 U. S., 645; *Hollister* v. *Benedict & B. Manufacturing Co.*, 113 U. S., 59, and *U. S.* v. *Palmer*, 128 U. S., 262, in which the United States was held upon implied contracts to pay the value of property taken, said:

> "But in each of these cases *the title of the plaintiff was admitted* and in none of them was any doubt thrown upon the correctness of the decision in Langford's case. * * * Here the claimants never authorized the use of the patent right by the Government; never consented to, but always protested against it, threatening to interfere by injunction or other proceedings to restrain such use. * * * The Government proceeded as though it were acting only in the management of its own property and the exercise of its own rights, and without any trespass upon the rights of the claimants. There was no point in the whole transaction, from its commencement to its close where the mind of the parties met or where there was anything in the semblance of an agreement. So not only does the petition count upon a tort, but also the findings show a tort" (pp. 459-460).

On the other hand, Mr. Justice Brewer quoted from the opinion in the case of *U. S.* v. *Palmer*, 128 U. S., 262, among other cases referred to by

him, where the facts showed a transaction constituting a contract and not a tort, as follows:

> "No tort was committed or is claimed to have been committed. The Government used the claimant's improvements with his consent; and, certainly, with the expectation on his part of receiving a reasonable compensation for the license. This is not a claim for an infringement, but a claim of compensation for an authorized use—two things totally distinct in the law, as distinct as trespass on lands is from use and occupation under the lease" (pp. 463-4).

(*c*) That the mere fact that the Government did not claim to *own* the property taken by it is not in itself sufficient to constitute the taking one as sovereign or to create an implied agreement to pay to the owner the reasonable value of the property, where the circumstances show that the Government did not expect to pay the owner for the property, is established by the recent decision of this Court in the case of *Harley* v. *U. S.*, 198 U. S., 229. In that case the Government used a patent device which it did not claim to own, but the circumstances showed that the Government did not intend to pay the owner and did not expect that he would ask for remuneration, for the reason that he was an employee of the Government. On these facts this Court held that there was (*a*) a mere tortious taking and use of the device, and that (*b*) no suit could be maintained against the Government for such tortious use. The Court said that the fact that there was no meeting of the minds of the parties distinguished the case from *McKeever* v. *United*

*States,* 14 Ct. Cl., 396, and *United States* v. *Lynah,* 188 U. S., 445.

Finally, in the *Buffalo-Pitts* case this Court referred with approval to and reaffirmed the ruling laid down in the *Harley* case. *(United States* v. *Buffalo-Pitts Co.,* 234 U. S., 228, at pp. 232-233.)

From the foregoing analysis of the *Lynah* case and the other cases referred to, it seems clear that the only proposition, for which the *Lynah* case can be said to be authority, is that there is a presumption that the Government takes property as sovereign and impliedly agrees to pay the reasonable value thereof to the owner, when it appears that the Government has appropriated property and (in the language of the *Lynah* case) the Government does not "pretend that it *owned* the property or had a *paramount proprietary right to its possession,*" and the Government does not "*set up any title to the property antagonistic to that claimed by the plaintiffs.*"

It is also clear, that where it appears as it did in the *Harley* case *(supra),* that although the Government admitted that it did not own the property, it claimed or believed that it had the right to use it without paying the owner, the taking must be held to be not upon an implied agreement to pay the owner, but, on the contrary, must be held to be tortious.

The question raised in the present case is not whether the Government was *competent* to take the property *as sovereign,* but whether *it actually did so take the property.*

While the Government did not claim to be the *owner* of the plaintiff's property, it did claim to

have the right, *by virtue of its contract with the Hubbard Building & Realty Company and the indebtedness owing by the Hubbard Building & Realty Company to the Government,* to take the property without any payment to the owner, but merely upon *crediting,* upon the indebtedness of the *Hubbard Building & Realty Company* to the Government, the *alleged value* of the property fixed by a Government employee in accordance with the provisions of the Hubbard Building & Realty Company contract, such amount being $11,578, *which was $3,500 less than the actual and reasonable value of the property as found by the Committee,* which was $15,000. (Findings of Committee, 17, 18, 19, 26, 32, fols. 75, 78; 82, 87.)

It is difficult to see how any claim could partake more of a proprietary nature and less of the character of a taking as sovereign. The whole theory of the taking as sovereign is that the Government takes the property, not because it has any lien upon it or title to it or contractual claim of any kind, but merely because as sovereign it has use for the property, to which except for the fact of the sovereignty it would have no right.

The situation in the present case, however, is the exact reverse in every respect of a taking as sovereign, and is exactly such a claim as might be made by any individual who had entered into a contract containing the clause in question. It is a claim that the Government—

1.—Was not bound to pay or credit the plaintiff at all;

2.—Was not bound to *pay* the Hubbard Building & Realty Company anything;

3.—Had what amounted to a lien upon the property to enforce payment of indebtedness of the Hubbard Building & Realty Company to the Government; and

4.—Could take the property on giving a credit to the Hubbard Building & Realty Company, not of the *actual or reasonable value,* but merely of the value *as fixed by an officer of the Government at an amount which was much less than the actual value.*

As a matter of fact, practically all of the authorities cited by the respondent on its original writ of error to the Circuit Court of Appeals, in support of the claim that the Government had the right to take the property of the petitioner under paragraph 33 of the contract between the Government and the Hubbard Building & Realty Company, and credit the value thereof as fixed by the Government engineer upon the debt owed by the Hubbard Building & Realty Company to the Government, were cases involving building contracts *between private persons.* The claim urged upon the Committee and upon this Court by respondent's counsel was that the Government had the right to take petitioner's property upon crediting the Hubbard Company with the value as fixed by the Government engineer, on the theory that the petitioner had constructive notice of the provisions of the contract between the Government and the Hubbard Building & Realty Company. Such a right would, of course, have been purely of a contractual and proprietary nature, such as is ordinarily claimed by private individuals.

It therefore seems clear that the taking of the

petitioner's property was, in the language of the Supreme Court in the *Lynah* case, a taking under a claim on the part of the Government of *"title antagonistic to that claimed by the plaintiffs,"* and was also under a claim of *"paramount proprietary right to its possession,"* and was not a taking by the Government as sovereign.

## II.

**Since the taking by the Government was tortious, this plaintiff cannot recover the value of its property from the Government.**

All of the cases on the subject of a taking by the Government recognize the fact that in some cases the Government takes property upon an implied contract to pay for it, and in other cases officers of the Government take property without such an implied contract, *and that in the latter case the taking is tortious.* See quotation from the opinion of Mr. Justice Gray in *Hill* v. *U. S.*, 149 U. S., 593, at page 30 of this brief.

From what has already been said under Point I (*supra*) it seems clear that no agreement on the part of the Government to pay the petitioner the value of its property can be implied in the present case and that consequently the taking was not as sovereign, but was tortious. In fact, as we read the opinion of the Circuit Court of Appeals on the first writ of error herein it recognized that the taking was or a least may have been tortious, as it stated:

> "It (the Government) made no proprietary claim, and therefore was bound to pay the real owner for the property *whether the taking was tortious or not.*"

It follows, from the fact that the taking of the petitioner's property was tortious, that the petitioner cannot recover from the *Government* the value of the property, either in an action for damages for the tort or in an action on the common counts.

In the decision of the Circuit Court of Appeals in *U. S.* v. *Buffalo-Pitts Co.*, 193 Fed. Rep., 905, that Court expressed the view that claims may be prosecuted against the United States under the Tucker Act even if sounding in tort. That Court based its ruling on that point upon certain language which had been used by Mr. Justice Brown in *Dooley* v. *U. S.*, 182 U. S., 222, and in the concurring opinion written by the same justice in the case of *U. S.* v. *Lynah*, 188 U. S., 445, at p. 475, and upon the alignment of the vote of the justices of this Court in deciding those and other cases.

There apparently was not called to the attention of the Circuit Court of Appeals at the time of the decision in the *Buffalo-Pitts* case, however, the decision of this Court in *Russell* v. *U. S.*, 182 U. S., 516, to the effect that *the Court of Claims did not have jurisdiction under the Tucker Act over obligations arising from tort.* The ruling made in the *Russell* case upon that point was followed in *Harley* v. *U. S.*, 198 U. S., 229, and has been recently reaffirmed in *U. S.* v. *Buffalo-Pitts Co.*, 234 U. S., 228, at pp. 232-233, as follows:

> *"True it is that under the Tucker act there is no jurisdiction in the court of claims or*

*district courts of the United States to recover for acts merely tortious,* the statute providing that there shall be no recovery except in cases not sounding in tort. It has been said in the case cited for the government, *Harley* v. *United States,* 198 U. S., 229; 49 L. ed., 1029; 25 Sup. Ct. Rep., 634, that there must be some meeting of the minds of the parties upon the fact that compensation will be made. In that case it was found that there was no demand based upon a convention between the parties, or coming together of minds, for while the plaintiff, an employee of the government in the Bureau of Printing and Engraving, supposed and understood he would be entitled to compensation for certain improvements made in printing presses which were used for many years by the Bureau, the findings also set forth in express terms that it was supposed and understood by the officers of the government that the claimant would neither expect nor demand remuneration, and this fact, said this court, distinguished it from *McKeever* v. *United States,* 14 Ct. Cl., 396, affirmed by this court; also from *United States* v. *Lynah,* 188 U. S., 445; 47 L. ed., 539; 23 Sup. Ct. Rep., 349, and the other cases cited by appellant."

In view of this language, it would seem to be established beyond question that no recovery can be had against the Government to recover the value of the property which has been tortiously taken by the Government.

The effect of the decision of the Circuit Court of Appeals in the present case, therefore, is that the petitioner is thereby deprived of a recovery against the respondent, the only tort feasor

against which it can bring suit for the conversion of its property, and the one which, as between the two (the Government and the respondent), it was agreed should be liable.

## III.

### No title can be acquired by a tortious taking.

As already pointed out, the decisions of the Supreme Court on the subject of taking of property by the Government, all distinguish between a taking by a Government as sovereign and a taking which is tortious. The language of these opinions indicates that a taking which is tortious is not a taking as sovereign, but that, on the contrary, the two classes of takings are mutually exclusive. We have also pointed out that no recovery can be had against the Government for tortious taking.

In addition to these considerations just adverted to, it seems clear that this Court, in stating that the Government *acquired title to the plaintiff's property*, overlooked the fact that no title can be acquired by a tortious taking of property. *Birdsell and Birdsell Mfg. Co.* v. *Gerhart Shalliol and Feikert*, 112 U. S., 485; *Lovejoy* v. *Murray*, 3 Wall., 1.

### In Conclusion.

We recognize the right of the United States Government to take property as sovereign with an implied promise to pay the value thereof; but when the United States Government enters into a written contract by virtue of the terms of which

it may under certain circumstances acquire title to property, then if it attempts to take property by virtue of the contract it is on exactly the same footing as a private individual who makes such a contract, that is to say, if it acts within its rights under the terms of the contract it acquires title to the property, but if it goes beyond its rights under the terms of the contract it does not acquire title to the property.

In the same way, when the Government purports to act in the taking of property by virtue of its rights under a written contract into which it has entered with a private corporation, and expressly disclaims any intention of acting in its capacity as sovereign, or of acquiring any rights except such as it acquires by virtue of such written contract, then it clearly does not act as sovereign and acquires no rights in that capacity. This is no hardship to the Government, for it always has the right to take property as sovereign regardless of any contracts; but it would seem to be only fair that if the Government enters into a contract by which the other party to the contract is bound, then, as long as the Government purports to act under that contract and disclaims any intention of acting otherwise, it is equally bound by the terms thereof and acquires only such rights as accrue to it thereunder.

Respectfully submitted,

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## SCHEDULE A.

*J. G. White & Co.* v. *Ball Engineering Co.*, 223 Fed., 618; 139 C. C. A., 164, Circuit Court of Appeals, Second Circuit. April 13, 1915, No. 214.

"Before LACOMBE, WARD, and ROGERS, *Circuit Judges.*

WARD, *Circuit Judge.*

(1) This is a writ of error to a judgment in favor of the plaintiff for damages for conversion by the defendant of certain personal property specified in the complaint used by defendant in constructing Lock and Dam No. 6 on the Trinity River, Tex. The trial was before a referee, called in Connecticut a "committee" and therefore the only question before us for consideration is whether his findings of fact sustain the judgment. We can look only at the pleadings, order of reference, findings of fact, conclusions of law, and judgment of the court. We cannot consider the testimony, the exhibits (except so far as included in the findings of fact), or the refusals of the committee to find. *Andes* v. *Slauson*, 130 U. S. 435, 9 Sup. Ct., 573, 32 L. Ed., 989; *David Lupton's Sons Co.* v. *Automobile Club*, 225 U. S., 489, 32 Sup. Ct., 711, 56 L. Ed., 1177, Ann. Cas., 1914B, 699; *Edenborn* v. *Sim*, 206 Fed., 275, 124 C. C. A., 339.

(2) What seems to us to be the material facts found by the committee were substantially as follows:

July 10, 1906, the Hubbard Building & Realty Company entered into a written agreement with

the United States to construct Lock and Dam No. 6 on the Trinity River, Tex.

Some time in the year 1908 a partnership composed of George A. Carden and P. D. C. Ball, trading under the name of the Ball-Carden Company, placed on the site of the lock and dam a considerable amount of property consisting of machinery, tools, and materials and used the same in constructing the lock and dam until the month of May, 1909.

In April or May, 1909, the partnership was dissolved, Carden transferring all his interest to Ball, who continued the work under the name of Ball Engineering Company until on or about September 8, 1909.

September 9, 1909, work on the lock and dam was discontinued, and October 22d the government, in accordance with its provisions, annulled the contract with the Hubbard Company.

April 2, 1910, the plaintiff, Ball Engineering Company, was incorporated under the laws of Missouri, and P. D. C. Ball transferred to it all of the property memtioned in the complaint.

June 6, 1910, the government entered into a written contract with the defendant, J. G. White Company, Inc., to complete the work.

The government took the property belonging to the plaintiff at a value of $11,578 fixed by the engineer and credited the amount in account of the Hubbard Company. It professed to act under section 33 of the contract with the Hubbard Company, which reads:

> 'Annulment.—In case of the annulment of this contract as conditionally provided for in the form of contract adopted and in use

by the Engineering Department of the Army, the United States shall have the right to take possession of, wherever they may be, and to retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of same, prepared for use or in use in the prosecution of the work, together with any or all leases, rights of way or quarry privileges, under purchase, at a valuation to be determined by the engineer officer in charge.'

This property the government leased to the defendant, who used the same in completing the work and after completion returned all of it to the government except such material as had been used in construction.

As a conclusion of law, the committee found the defendant had as of July 6, 1910, unlawfully converted the property of the plaintiff mentioned in the complaint of the fair market value of $15,000, for which sum with interest at 6 per cent. from that date the plaintiff was entitled to judgment.

The district judge entered judgment in accordance with the report of the committee, and the defendant has taken this writ of error from the same.

We think the committee and the court below correctly held that the government had no right to take the property of the plaintiff, a third party, by virtue of anything contained in its contract with the Hubbard Company. All the same it did take the property with knowledge that it was claimed by the plaintiff and used it in the construction of this public work. It was as

sovereign entirely competent to do this subject to the obligation of making just compensation, as required by the fifth amendment to the Constitution. It made no proprietary claim, and therefore was bound to pay the real owner for the property, whether the taking was tortious or not. It fully recognized this obligation by crediting the Hubbard Company with the value. The fact that it recognized the wrong person as owner and erroneously relied upon the contract with the Hubbard Company, by which the plaintiff was not bound, in no respect changed the material fact that it had taken the property and acquired title thereto. The defendant in its answer justified by virtue of title in the United States which was the material consideration, although it followed the erroneous theory that the government was justified in acting as against the plaintiff under the contract with the Hubbard Company. The plaintiff also relies upon a provision in the contract between the defendant and the government to the effect that:

> 'If so requested in writing by the contractor, the United States will exercise the right conferred by paragraph 33 of the specifications forming part of the annulled contract with the Hubbard Building & Realty Company, to take possession of and retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of the same prepared for use or in use in the prosecution of the work at a valuation to be determined by the engineer officer in charge, and the contractor for the completion of the work will be permitted to use such plant and ma-

terial in the prosecution of the work, for which he will be charged a fair rental or purchase value, to be determined by the engineer officer in charge. It must, however, be clearly understood that since the ownership of the above-mentioned plant and materials is not free from doubt, the United States does not undertake to transfer title, does not guarantee peaceable possession and uninterrupted use, and will not defend any action or writ that may be instituted against the contractor concerning the same, nor be responsible for nor assume any expenses or costs in connection therewith. Nothing that may result from the exercise of the above-mentioned right shall be made the basis of a claim against the United States or its officers or agents.'

We regard this provision as quite immaterial. The defendant is making no claim against the government, and the plaintiff is no more concerned with this contract than it was with the contract between the government and the Hubbard Company.

We have considered this general subject in United States *v.* Buffalo-Pitts Co., 193 Fed., 905, 114 C. C. A., 119, affirmed 234 U. S., 228, 34 Sup. Ct., 840, 58 L. Ed., 1290. In accordance with that decision, we think that the government took title to the property in question and leased it to the defendant, who in using it was not guilty of any conversion.

The judgment is reversed."